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WHEN: Tuesday, September 11, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2012–0429]

Airbus Operations GmbH Grant of Exemption No. 10611

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of FAA Grant of Exemption No. 10611

SUMMARY: This document contains a summary of the agency's decision on a petition for exemption. The purpose of the document is to improve the public's awareness and inform affected operators of the FAA's decision.

DATES: The exemption became effective on August 28, 2012.

FOR FURTHER INFORMATION CONTACT: Frances Shaver, (202) 267–4059, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, or Katie Haley, (202) 493–5708, Office of Rulemaking, ARM–207, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

ADDRESSES: Availability of the notice of exemption: You can obtain an electronic copy of this document or Exemption No. 10611 by—

1. Searching the Federal eRulemaking Portal at *http://www.regulations.gov;*

2. Accessing the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR;* or

3. Contacting the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document.

SUPPLEMENTARY INFORMATION:

Summary of Grant of Exemption

Docket No.: FAA–2012–0429.

Petitioner: Airbus Operations GmbH.

Sections of 14 CFR Affected: Part 121.

On August 28, 2012, the FAA granted an exemption in the matter of the petition of Airbus Operations GmbH. The exemption from 14 CFR 121.344(f) and Appendix M is granted to the extent necessary to allow the operators of the Airbus model 318, 319, 320 and 321 airplanes listed in Exemption No. 10611 to temporarily operate these airplanes without complying with the digital flight data recorder sampling rate requirement, subject to the conditions and limitations listed in the exemption. Among other conditions and limitations, each operator of an affected airplane must, within 90 days of issuance of the exemption (August 28, 2012), submit a letter to its principal inspector that, among other things, includes a request to use Exemption No. 10611.

Issued in Washington, DC, on September 4, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

[FR Doc. 2012–22095 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121 and 129

[Docket No. FAA–2006–24281; Amendment Nos. 121–360A, 129–51A]

RIN 2120–AI05

Aging Airplane Program: Widespread Fatigue Damage; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical amendment; correction.

SUMMARY: The FAA is correcting a technical amendment published May 24, 2012 to a final rule published November 15, 2010. The final rule required design approval holders of certain existing airplanes and all applicants for type certificates of future transport category airplanes to establish a limit of validity of the engineering data that supports the structural maintenance program (hereinafter referred to as LOV). It also required that operators of any affected airplane incorporate the LOV into the maintenance program for that airplane. The technical amendment to the final rule was issued to correct errors, but within its publication, it contained inadvertent errors due to pagination in two tables. This document corrects the errors in those tables.

DATES: This corrective action becomes effective September 7, 2012.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Walter Sippel, ANM–115, Airframe/Cabin Safety Branch, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2774; facsimile (425) 227–1232; email *walter.sippel@faa.gov.*

For legal questions concerning this action, contact Doug Anderson, Office of Regional Counsel, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2166; facsimile (425) 227–1007; email *douglas.anderson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On May 24, 2012, the FAA published a technical amendment to a final rule. The technical amendment is entitled ''Aging Airplane Program: Widespread Fatigue Damage'' (77 FR 30877), which corrected a final rule published November 15, 2010 (75 FR 69746).

In that technical amendment, the FAA intended to correct compliance dates of §§ 26.21, 121.1115, and 129.115 for Airbus A310 and A300–600 series airplanes. Upon publication, however, the technical amendment contained inadvertent errors due to pagination in two of the tables.

Accordingly, FAA amends 14 CFR parts 121 and 129 by making the following technical amendments:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 46105.

■ 2. In § 121.1115, revise the table entitled ''Table 1—Airplane Subject to § 26.21'' to read as follows:

§ 121.1115 Limit of validity.

* * * * *

TABLE 1—AIRPLANES SUBJECT TO § 26.21

Airplane model	Compliance date—months after January 14, 2011	Default LOV [flight cycles (FC) or flight hours (FH)]
Airbus—Existing [1] Models Only:		
A300 B2–1A, B2–1C, B2K–3C, B2–203	30	48,000 FC
A300 B4–2C, B4–103	30	40,000 FC
A300 B4–203	30	34,000 FC
A300–600 Series	60	30,000 FC/67,500 FH
A310–200 Series	60	40,000 FC/60,000 FH
A310–300 Series	60	35,000 FC/60,000 FH
A318 Series	60	48,000 FC/60,000 FH
A319 Series	60	48,000 FC/60,000 FH
A320–100 Series	60	48,000 FC/48,000 FH
A320–200 Series	60	48,000 FC/60,000 FH
A321 Series	60	48,000 FC/60,000 FH
A330–200, –300 Series (except WV050 family) (non enhanced)	60	40,000 FC/60,000 FH
A330–200, –300 Series WV050 family (enhanced)	60	33,000 FC/100,000 FH
A330–200 Freighter Series	60	See NOTE.
A340–200, –300 Series (except WV 027 and WV050 family) (non enhanced)	60	20,000 FC/80,000 FH
A340–200, –300 Series WV 027 (non enhanced)	60	30,000 FC/60,000 FH
A340–300 Series WV050 family (enhanced)	60	20,000 FC/100,000 FH
A340–500, –600 Series	60	16,600 FC/100,000 FH
A380–800 Series	72	See NOTE.
Boeing—Existing [1] Models Only:		
717	60	60,000 FC/60,000 FH
727 (all series)	30	60,000 FC
737 (Classics): 737–100, –200, –200C, –300, –400, –500	30	75,000 FC
737 (NG): 737–600, –700, –700C, –800, –900, -900ER	60	75,000 FC
747 (Classics): 747–100, –100B, –100B SUD, -200B, –200C, –200F, –300, 747SP, 747SR.	30	20,000 FC
747–400: 747–400, –400D, –400F	60	20,000 FC
757	60	50,000 FC
767	60	50,000 FC
777–200, –300	60	40,000 FC
777–200LR, 777–300ER	72	40,000 FC
777F	72	11,000 FC
Bombardier—Existing [1] Models Only:		
CL–600: 2D15 (Regional Jet Series 705), 2D24 (Regional Jet Series 900)	72	60,000 FC
Embraer—Existing [1] Models Only:		
ERJ 170	72	See NOTE.
ERJ 190	72	See NOTE.
Fokker—Existing [1] Models Only:		
F.28 Mark 0070, Mark 0100	30	90,000 FC
Lockheed—Existing [1] Models Only:		
L–1011	30	36,000 FC
188	30	26,600 FC
382 (all series)	30	20,000 FC/50,000 FH
McDonnell Douglas—Existing [1] Models Only:		
DC–8, –8F	30	50,000 FC/50,000 FH
DC–9 (except for MD–80 models)	30	100,000 FC/100,000 FH
MD–80 (DC–9–81, –82, –83, –87, MD–88)	30	50,000 FC/50,000 FH
MD–90	60	60,000 FC/90,000 FH
DC–10–10, –15	30	42,000 FC/60,000 FH
DC–10–30, –40, –10F, –30F, –40F	30	30,000 FC/60,000 FH
MD–10–10F	60	42,000 FC/60,000 FH
MD–10–30F	60	30,000 FC/60,000 FH
MD–11, MD–11F	60	20,000 FC/60,000 FH
Maximum Takeoff Gross Weight Changes:		
All airplanes whose maximum takeoff gross weight has been decreased to 75,000 pounds or below after January 14, 2011, or increased to greater than 75,000 pounds at any time by an amended type certificate or supplemental type certificate.	30, or within 12 months after the LOV is approved, or before operating the airplane, whichever occurs latest.	Not applicable.
All Other Airplane Models (TCs and amended TCs) not Listed in Table 2	72, or within 12 months after the LOV is approved, or before operating the airplane, whichever occurs latest.	Not applicable.

[1] Type certificated as of January 14, 2011.

Note: Airplane operation limitation is stated in the Airworthiness Limitation section.

* * * * *

PART 129—OPERATIONS: FOREIGN AIR CARRIERS AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE

■ 3. The authority citation for part 129 continues to read as follows:

Authority: 49 U.S.C. 1372, 40113, 40119, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901–44904, 44906, 44912, 46105, Pub. L. 107–71 sec. 104.

■ 4. In § 129.115, revise the table entitled ''Table 1—Airplane Subject to 26.21'' to read as follows:

§ 129.115 Limit of validity.

* * * * *

TABLE 1—AIRPLANES SUBJECT TO § 26.21

Airplane model	Compliance Date—months after January 14, 2011	Default LOV [flight cycles (FC) or flight hours (FH)]
Airbus—Existing [1] Models Only:		
A300 B2–1A, B2–1C, B2K–3C, B2–203	30	48,000 FC
A300 B4–2C, B4–103	30	40,000 FC
A300 B4–203	30	34,000 FC
A300–600 Series	60	30,000 FC/67,500 FH
A310–200 Series	60	40,000 FC/60,000 FH
A310–300 Series	60	35,000 FC/60,000 FH
A318 Series	60	48,000 FC/60,000 FH
A319 Series	60	48,000 FC/60,000 FH
A320–100 Series	60	48,000 FC/48,000 FH
A320–200 Series	60	48,000 FC/60,000 FH
A321 Series	60	48,000 FC/60,000 FH
A330–200, –300 Series (except WV050 family) (non enhanced)	60	40,000 FC/60,000 FH
A330–200, –300 Series WV050 family (enhanced)	60	33,000 FC/100,000 FH
A330–200 Freighter Series	60	See NOTE.
A340–200, –300 Series (except WV 027 and WV050 family) (non enhanced)	60	20,000 FC/80,000 FH
A340–200, –300 Series WV 027 (non enhanced)	60	30,000 FC/60,000 FH
A340–300 Series WV050 family (enhanced)	60	20,000 FC/100,000 FH
A340–500, –600 Series	60	16,600 FC/100,000 FH
A380–800 Series	72	See NOTE.
Boeing—Existing [1] Models Only:		
717	60	60,000 FC/60,000 FH
727 (all series)	30	60,000 FC
737 (Classics): 737–100, –200, –200C, –300, –400, –500	30	75,000 FC
737 (NG): 737–600, –700, –700C, –800, –900, –900ER	60	75,000 FC
747 (Classics): 747–100, –100B, –100B SUD, -200B, –200C, –200F, –300, 747SP, 747SR.	30	20,000 FC
747–400: 747–400, –400D, –400F	60	20,000 FC
757	60	50,000 FC
767	60	50,000 FC
777–200, –300	60	40,000 FC
777–200LR, 777–300ER	72	40,000 FC
777F	72	11,000 FC
Bombardier—Existing [1] Models Only:		
CL–600: 2D15 (Regional Jet Series 705), 2D24 (Regional Jet Series 900)	72	60,000 FC
Embraer—Existing [1] Models Only:		
ERJ 170	72	See NOTE.
ERJ 190	72	See NOTE.
Fokker—Existing [1] Models Only:		
F.28 Mark 0070, Mark 0100	30	90,000 FC
Lockheed—Existing [1] Models Only:		
L–1011	30	36,000 FC
188	30	26,600 FC
382 (all series)	30	20,000 FC/50,000 FH
McDonnell Douglas—Existing [1] Models Only:		
DC–8, –8F	30	50,000 FC/50,000 FH
DC–9 (except for MD–80 models)	30	100,000 FC/100,000 FH
MD–80 (DC–9–81, –82, –83, –87, MD–88)	30	50,000 FC/50,000 FH
MD–90	60	60,000 FC/90,000 FH
DC–10–10, –15	30	42,000 FC/60,000 FH
DC–10–30, –40, –10F, –30F, –40F	30	30,000 FC/60,000 FH
MD–10–10F	60	42,000 FC/60,000 FH
MD–10–30F	60	30,000 FC/60,000 FH
MD–11, MD–11F	60	20,000 FC/60,000 FH
Maximum Takeoff Gross Weight Changes:		
All airplanes whose maximum takeoff gross weight has been decreased to 75,000 pounds or below after January 14, 2011, or increased to greater than 75,000 pounds at any time by an amended type certificate or supplemental type certificate.	30, or within 12 months after the LOV is approved, or before operating the airplane, whichever occurs latest.	Not applicable.

TABLE 1—AIRPLANES SUBJECT TO § 26.21—Continued

Airplane model	Compliance Date—months after January 14, 2011	Default LOV [flight cycles (FC) or flight hours (FH)]
All Other Airplane Models (TCs and amended TCs) not Listed in Table 2	72, or within 12 months after the LOV is approved, or before operating the airplane, whichever occurs latest.	Not applicable.

[1] Type certificated as of January 14, 2011.
Note: Airplane operation limitation is stated in the Airworthiness Limitation section.

* * * * *

Issued in Washington, DC, on August 24, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

[FR Doc. 2012–22090 Filed 9–6–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 420

[Docket No. FAA–2011–0105; Amdt. No. 420–6]

RIN 2120–AJ73

Explosive Siting Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends the requirements for siting explosives under a license to operate a launch site. It increases flexibility for launch site operators in site planning for the storage and handling of energetic liquids and explosives.

DATES: Effective November 6, 2012.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule contact Yvonne Tran, Commercial Space Transportation, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–7908; facsimile (202) 267–5463, email *yvonne.tran@faa.gov*. For legal questions concerning this final rule contact Laura Montgomery, AGC 200, Senior Attorney for Commercial Space Transportation, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3150; facsimile (202) 267–7971, email *laura.montgomery@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The Commercial Space Launch Act of 1984, as amended and re-codified at 51 United States Code (U.S.C.) Subtitle V—Commercial Space Transportation, ch.509, Commercial Space Launch Activities, 51 U.S.C. 50901–50923 (the Act), authorizes the Department of Transportation (DOT) and thus the FAA, through delegations, to oversee, license, and regulate commercial launch and reentry activities, and the operation of launch and reentry sites as carried out by U.S. citizens or within the United States. 51 U.S.C. 50904, 50905. Authority for this particular rulemaking is derived from 51 U.S.C. 50905, which requires that the FAA issue a license to operate a launch site consistent with public health and safety. *See also* 49 U.S.C. 322(a), 51 U.S.C. 50901(a)(7). Section 50901(a)(7) directs the FAA to regulate only to the extent necessary to, in relevant part, protect the public health and safety and safety of property.

I. Overview of Final Rule

This final rule amends part 420 of Title 14 of the Code of Federal Regulations (14 CFR) Chapter III, updating the FAA's requirements for how to site explosives under a license to operate a launch site.[1] Part 420 establishes criteria for siting facilities at a launch site where solid propellants, energetic liquids, or other explosives are located to prepare launch vehicles and payloads for flight. These criteria are commonly referred to as quantity-distance (Q–D) requirements because they provide minimum separation distances between explosive hazard facilities, surrounding facilities and locations where the public may be present on the basis of the type and quantity of solid propellants, energetic liquids, and other explosives located within the area. Minimum separation distances are necessary to protect the public from explosive hazards.

The FAA is making a number of changes consistent with the goals of Executive Order 13610, Identifying and Reducing Regulatory Burdens, 77 FR 28469 (May 14, 2012). First, the FAA is dispensing with its separation distance requirements at launch sites for storing liquid oxygen, nitrogen tetroxide, hydrogen peroxide in concentrations equal to or below 91 percent, and refined petroleum-1 (RP–1). If these energetic liquids are not within an intraline distance of an incompatible energetic liquid or co-located on a launch vehicle, the FAA is no longer imposing public area separation distances because the current separation requirements for storing these energetic liquids unnecessarily duplicate the requirements of the Occupational Safety and Health Administration. Second, the FAA is decreasing the separation distances required for division 1.1 explosives and liquid propellants with trinitrotoluene (TNT) equivalents of less than or equal to 450 pounds. Although decreased, the revised separation requirements will continue to protect against hazardous fragments, which are defined as having a kinetic energy of 58 foot-pounds, which is a level of kinetic energy capable of causing a fatality. The probability of a person six feet tall and one foot wide being struck by a hazardous fragment at a given separation from a given net explosive weight (NEW) is one percent, which is an equivalent level of safety to today's separation distances. Third, the FAA is reducing the separation distances for the storage and handling of division 1.3 explosives, while maintaining a level of safety equivalent to current requirements. Fourth, the FAA is eliminating its own separation distance requirements for storing liquid oxidizers and Class I, II and III flammable and combustible liquids because they duplicate the requirements of other regulatory regimes. Consistent with the

[1] The FAA published a notice of proposed rulemaking (NPRM) that proposed the changes to part 420 that the FAA is now adopting. *Explosive Siting Requirements,* 76 FR 8923 (Feb. 16, 2011).

current Department of Defense (DOD) Explosive Siting Board's (DDESB) and National Fire Protection Association (NFPA) practice, the FAA is dispensing with the hazard groups of tables E–3 through E–6 of appendix E of part 420 as a means of classification. This revision will conform the FAA's classification to the NFPA classification system, which is more commonly used to reflect chemical hazards of energetic liquids used at commercial launch sites. Finally, a site map must now be at a sufficient scale to determine compliance with part 420.

II. Background

In 2000, the FAA issued rules governing the storage and handling of explosives as part of its regulations governing the licensing and operation of a launch site. *Licensing and Safety Requirements for Operation of a Launch Site; Final Rule,* 65 FR 62812 (Oct. 19, 2000) (Launch Site Rule). The FAA has requirements for obtaining a license to operate a launch site in part 420. Part of the application for a license requires an applicant to provide the FAA with an explosive site plan that complies with the explosive siting requirements of part 420. The plan must show how a launch site operator will separate explosive hazard facilities from the public. It must identify the location of the explosives and how the public is safeguarded. The explosive siting requirements of part 420 mandate how far apart a launch site operator should site its explosive hazard facilities based on the quantities of energetic materials housed in each facility. Distances vary based on the quantities at issue, whether the energetic materials at a given facility are being handled or stored, and whether or not the distance being calculated is a distance to a public area or public traffic route.

Since the original rulemaking, the FAA's experience with the requirements has led it to the current changes. At the time it promulgated the original requirements, the FAA anticipated that any new launch sites would have similar siting issues as launch sites devoted to expendable launch vehicles, and, therefore, relied on the siting requirements of the DDESB *DOD Ammunition and Explosive Safety Standard,* 6055.9–STD (1997) (1997 DOD Standard).[2] Instead, for the most part, the FAA has issued a number of licenses for the operation of launch sites at existing airports, such as Mojave Air and Space Port in California. At these airports, the presence of jet fuels regulated under existing FAA space transportation requirements created conditions requiring the FAA to reconcile and clarify its separation requirements for launch vehicle liquid propellant requirements with the presence of other industrial chemicals, such as aircraft fuels. Based on experience with these launch sites and on research on other regimes that address explosive materials, the FAA amends its own requirements as described above.

III. Discussion of Public Comments and Final Rule

The comment period for the NPRM closed on May 17, 2011. The FAA received comments from XCOR Aerospace (XCOR). XCOR's comments support the FAA's acceptance of a separation distance different from the one required by §§ 420.63 through 420.69 if an operator demonstrates an equivalent level of safety. XCOR also supports the FAA's proposal to abandon storage requirements for the types of liquid fuels and oxidizers that are already regulated by OSHA. The FAA also received a number of opposing comments from XCOR. They are discussed below and address the FAA's jurisdiction over explosive hazards, the nature of explosive hazards and whether energetic liquids are all explosives, the interplay between the definition of liquid propellants and aviation fuels, the appropriate license for dealing with explosive hazards and, lastly, stoichiometric ratios, the theoretical ratio of fuel and oxidizer at which the fuel is burned completely.

As an initial matter, the FAA must address XCOR's objection to the FAA's jurisdiction over treating a location where static engine firing takes place as an explosive hazard facility. XCOR at 12.[3] Congress charged the FAA with licensing and regulating the operation of launch sites as well as launches. 51 U.S.C. 50904. Explosive hazards are present at launch sites and may threaten members of the public who are also present at the site, as well as persons outside of the launch site. Because static firing of an engine involves the handling of energetic liquids or explosives and all the hazards associated with their mixing, the FAA finds it necessary to require separation distances between the location and the public. At commercial launch sites, locations where static firing occurs are considered explosive hazard facilities under § 420.5.

As it proposed in the NPRM, the FAA is adopting and defining the term ''energetic liquids'' to mean a liquid, slurry, or gel, consisting of, or containing an explosive, oxidizer, fuel, or combination of the above, that may undergo, contribute to, or cause rapid exothermic decomposition. XCOR opposes the FAA's proposed definition of ''energetic liquids'' on the grounds that there is no need for the FAA to regulate fuels and oxidizers, as explosives, because, according to XCOR, energetic liquids are not explosives. XCOR at 6.

In 2000, the FAA found it necessary to regulate both explosives and liquid propellants, but did not define the latter. The FAA's use of both terms apparently created the erroneous impression that the FAA only regulated materials that do not require mixing to explode, notwithstanding the FAA's inclusion of liquid propellants in its part 420 requirements. As should be evident from the FAA's requirements for materials other than division 1.1 explosives, the FAA has not so limited itself. ''Explosive'' is a broad term, and the FAA is using it throughout part 420 as such. Because of past confusion, the FAA is now defining ''energetic liquids'' to encompass liquid fuels, oxidizers, and liquid propellants.

XCOR believes that if a fuel and oxidizer are not mixed, the FAA's separation requirements for energetic liquids are not necessary. The FAA's requirements, however, are designed to mitigate harm caused by inadvertent mixing. Energetic liquids such as fuels and oxidizers may, when mixed, produce the reactions of and share characteristics with materials that are explosives in the truest technical sense. Explosions are due to the sudden release of energy over a short period of time and may or may not involve chemical reactions.[4] Three basic

[2] The DDESB updated the DOD Standard in 2004. *Notice of Revision of Department of Defense 6055.9–STD Department of Defense Ammunition and Explosives Safety Standards,* 70 FR 24771 (May 11, 2005) (2004 DOD Standard). DOD released a new edition in 2008, but the 2004 changes are the ones relevant to this rulemaking. The 2004 DOD standard bases its separation distances for storage on Occupational Safety and Health Administration (OSHA) and NFPA standards for classes I through III flammable and combustible liquids and liquid oxygen, and on NFPA standards for classes 2 and 3 liquid oxidizers. The 2004 DOD Standard contains less restrictive requirements for explosive division 1.1 solid explosives with a net explosive weight of less than or equal to 450 pounds, and for energetic liquids with a TNT equivalence of less than or equal to 450 pounds. The FAA is mirroring these requirements now.

[3] XCOR Aerospace, Comments to NPRM (FAA–2011–0105), Online posting, http://www.regulations.gov/#!searchResults;rpp=10;po=0;s=faa-2011–0105, (May 18, 2011) (referred to as XCOR).

[4] Crowl, D.A., Understanding Explosions, AIAA Center for Chemical Process Safety (CCPS), 2, (2003).

characteristics of an explosion are: a sudden energy release, a rapidly moving blast or shock wave, and a blast of a magnitude large enough to be potentially hazardous. Additionally, explosions may be purely a physical event involving a sudden release of mechanical energy, or a chemical explosion requiring a chemical reaction. Furthermore, an accident may happen without mixing. For example, liquid oxygen is an oxidizer and is usually stored in its liquid state at a very low temperature. Because liquid oxygen has a very large liquid-to-gas-expansion ratio, 1 to 860 at 68° F, it can undergo an explosion known as a boiling liquid expanding vapor explosion, commonly referred to as a BLEVE. The FAA recognizes that no one intends inadvertent mixing, but because it can happen and because not all accidents are the result of mixing, separation distances are necessary for energetic liquids.

As proposed, the FAA now defines ''liquid propellant'' to mean a monopropellant or incompatible energetic liquids co-located for purposes of serving as propellants on a launch vehicle or a related device. In response to XCOR's comment that unmixed fuels and oxidizers do not explode, the FAA is clarifying that the co-location of incompatible energetic liquids makes something a liquid propellant only where the incompatible energetic liquids are housed in tanks connected by piping for purposes of mixing. The stored energy present when incompatible energetic liquids are connected by piping poses a hazard requiring separation distances because, under feasible conditions, the system may fail and cause fire, blast, and flying fragment hazards. It is because of these hazards that organizations such as the NFPA require a minimum separation distance of 20 feet between a liquid fuel and an oxidizer. Obviously, for launch, this is not possible, but the NFPA requirement underscores the importance of separating a fueled launch vehicle from the public. For most liquid fueled launch vehicles, incompatible energetic liquids such as fuels and oxidizers are housed in separate tanks on the vehicle. Pipes lead from each tank to a combustion chamber where combustion takes place to generate thrust. The presence of the piping is designed to ensure mixing in the combustion chamber in order to achieve propulsion. Accordingly, the FAA is revising its definition of liquid propellants from what it proposed to the following: A monopropellant or an incompatible energetic liquid co-located for purposes of serving as propellants on a launch vehicle or a related device where the incompatible energetic liquids are housed in tanks connected by piping for purposes of mixing. This new reference to ''connecting piping'' should alleviate concerns that the FAA intends the definition of liquid propellants to apply to aircraft or tanker trucks. *See* XCOR at 6, 7.

XCOR claims that because a launch license will govern incompatible energetic liquids co-located on a launch vehicle, these issues should not be addressed through a site license. XCOR at 3, 8. The FAA does not dispute that the launch license will govern launch. That being said, the launch operator will also have to operate with separation distances in effect. This means the site operator's advance planning attendant to explosive siting will not go to waste. For example, § 417.411, which applies to launch operators, requires safety clear zones that would keep the hazards associated with a launch operator's vehicle from the public during launch processing.[5] Accordingly, a site operator must be able to provide appropriately sited facilities that permit a launch operator to comply with its requirements.[6] Similarly, XCOR maintains that, in the context of the definition of liquid propellants, energetic liquids are better addressed in the launch license where an appropriate hazard assessment will be conducted. The FAA agrees, but there still needs to be enough room to encompass the results of that assessment. For example, if a launch operator performs its hazard assessment and it, or the FAA, determines that it needs a great deal of room to encompass its hazards, the launch site operator's preliminary explosive siting should already have made sure that the necessary separation distances are in place at the launch site. Different launch vehicles may have different levels of quality, safety, and reliability, depending on the maturity of the technology and the organization, which means that the site operator's separation distances must account for a worst-case launch vehicle.

XCOR suggests the FAA take into account launch vehicle design and construction when determining separation distances at a launch site where the launch vehicles may vary in reliability. XCOR at 3, 8. XCOR brings to light an issue that requires clarification. Part 420 addresses a different issue than a launch operator's safety clear zone. Under parts 417 and 437, a launch operator must establish a safety clear zone during pre- and post-flight operations. Part 420 requires there be room for such safety clear zones in the first place. Otherwise, when constructing or establishing a launch site, a site operator may fail to plan for the safety needs and regulatory requirements of its customers. The philosophy underlying the necessity for separation distance requirements is that there must be room for hazardous operations, even those covered by other licenses. Accordingly, the separation distances for the site operator must account for vehicles of varying quality and reliability.

The FAA is amending its definition of ''explosive hazard facility'' to clarify that it includes locations and facilities at a launch site where solid propellants, liquid propellants or other explosives are stored or handled. XCOR objected to the proposed definition of an ''explosive hazard facility'' because it includes facilities containing energetic liquids, including liquid oxygen. XCOR at 4. XCOR maintains this conflicts with the FAA proposal that it would no longer require separation distances around liquid oxygen. Although the FAA will no longer require separation distances for many energetic liquids, a site operator must still, in its explosive site plan, identify all explosive hazard facilities where all energetic liquids will be located. The FAA has been regulating liquid oxygen as part of an explosive hazard facility since 2000, characterizing liquid oxygen as a liquid propellant, and will continue to do so under the new rule, while characterizing it as an energetic liquid. However, because the FAA has been attempting to reduce duplicative requirements, the FAA will rely on OSHA's regulations. Therefore, while the FAA will no longer require separation distances around liquid oxygen, OSHA will continue to do so, and for the FAA to fail to recognize that liquid oxygen is an energetic liquid would only create confusion. As discussed in the NPRM, OSHA's requirements are extensive and serve to protect the safety of the public as an ancillary benefit to OSHA's protection of worker safety.

Lastly, XCOR comments that the net explosive weight (NEW) of liquid propellant should not be based on the

[5] Section 417.411(a)(1) requires a launch operator to establish a safety clear zone able to confine an adverse explosive event, based on a worst-case event, regardless of the fault tolerance of the system.

[6] On a related note, XCOR raises the possibility of having to evacuate the public as a result of the FAA's regulations. XCOR at 7. As is the case under the current requirements, the better solution than evacuation would be to relocate a hazardous operation. If a site operator addresses the necessary separation distances, neither relocation nor evacuation should be necessary.

total quantity of liquid fuel and oxidizer available on a launch vehicle, but only on the portion where the liquid fuel and oxidizer are at a stoichiometric ratio. XCOR at 10. For example, XCOR postulated a horizontal vehicle dumping unused oxidizer so that it returns to the runway with only 100 pounds of liquid oxygen and 1000 pounds of kerosene aboard. XCOR maintains that part 420 would require it to treat the amount of kerosene in excess of that which would react explosively as, in fact, exploding. Therefore, any excess should be ignored. XCOR's comments relate to existing requirements that the FAA did not propose to change. Therefore, its comments are outside the scope of this rulemaking. Additionally, part 420 addresses a site operator's location of its facilities, and XCOR raises an operational issue addressed not through a launch site operator license, but through a launch license. The FAA would assess NEW for scenarios hypothesized by XCOR under a launch license or permit.

Differences Between the NPRM and the Final Rule

This final rule is adopted for the reasons discussed in the NPRM, but with minor changes from what the FAA proposed. The FAA is defining ''explosive hazard facility'' to mean a facility or location at a launch site where solid propellants, energetic liquids, or other explosives are stored or handled. In the NPRM, the FAA proposed to define this facility as one where, in relevant part, solid explosives were stored or handled. However, this would have created redundancies with the references to ''solid explosives'' and ''other explosives'' being references to the same thing; the FAA is accordingly keeping the original reference to solid propellants.

The FAA requires a launch site operator to submit a scaled map that shows the location of all explosive hazard facilities at the launch site, the actual and minimal allowable distances between each explosive hazard facility and all other explosive hazard facilities, each public traffic route, and each public area, including the launch site boundary. The NPRM incorrectly identified the public traffic route as a public area. This is relevant for division 1.1 explosives because the separation distances between an explosive hazard facility and a public traffic route are less than those between an explosive hazard facility and a public area. Likewise, § 420.63(d), which permits a site operator to demonstrate an equivalent level of safety now clarifies that this form of relief applies to separation distances to public traffic routes as well as to public areas. See also § 420.67(a) (separating incompatible energetic liquids from public traffic routes); § 420.69 (separating division 1.1 and 1.3 explosives co-located with liquid propellants from public traffic routes).

The FAA is clarifying its requirement that a launch site operator must separate each explosive hazard facility where the NEW is greater than 450 pounds and less than 501,500 pounds from each public area containing any member of the public in the open by a distance equal to $-1133.9 + [389 * \ln(NEW)]$.[7] Accordingly, the final rule contains this requirement not only in section 420.65(c)(3), where it appeared in the NPRM, but also in sections 420.67(d)(3) and 420.69(b)(4), (c) and (d)(5), where it was inadvertently omitted. The FAA discussed the reasons for this provision in its original discussion. NPRM at 8928.

The final rule, § 420.65(c)(3), which governs the handling of division 1.1 and 1.3 explosives, now requires each public area containing any member of the public in the open to be separated from an explosive hazard facility by a distance equal to $-1133.9 + [389 * \ln(NEW)]$ where the NEW is greater than 450 pounds and less than 501,500 pounds. The NPRM incorrectly[8] identified the range of NEW as less than 600,000 pounds, rather than 501,500 pounds. Above 501,500 pounds the NEW formulas for blast and fragments show that blast hazards, rather than fragment hazards, determine the separation distance. This means that an operator must use a blast formula rather than a fragment formula for quantities above 501,500 pounds. Table E–2 contains the formulas.

In the NPRM, the FAA stated, in proposed footnote 3 of Table E–3 that a net explosive weight of greater than 500,000 pounds was not allowed for division 1.1 explosives because it was implied in the 2004 DOD Standard. Further investigation has disclosed, however, that the FAA misread the DDESB limitation. The FAA now understands that the limitation meant only that the table's intraline distances could not be used for division 1.1 explosives.

In the interest of greater clarity, the FAA is modifying § 420.65(d)(2), from what it proposed in the NPRM to clarify that when a site operator has quantities of explosives that fall between table entries, the site operator may use a formula provided by the tables to find a separation distance different than the one listed for the specified quantity. For example, if a site operator has 17 pounds of division 1.1 explosives, table E–1 would require a separation distance for a public area of either 506 or 529 feet. However, the site operator may calculate a distance using footnote 1 that falls between these two distances. The FAA's change clarifies that the site operator must use the equation from the same table as the distance the site operator seeks to determine. In other words, the site operator may not use an equation from table 2 to calculate a distance for table 1. Similarly, for paragraph (e)(3), a site operator with existing structures who wants to calculate the maximum quantity of explosives permitted in those structures may not use an equation from another table to calculate for a quantity being calculated.

Section 420.69 now clarifies that a launch site operator may, when determining separation distances for co-location of division 1.1 and 1.3 explosives with liquid propellants, employ a maximum credible event (MCE) assessment under paragraph (e) rather than using the separation distances prescribed by paragraphs (b), (c) and (d). The NPRM incorrectly described the MCE assessment as a requirement rather than an option. An MCE assessment is one way of demonstrating an equivalent level of safety.

Finally, in table E–7 of Appendix E of part 420, the FAA inadvertently transcribed a footnote from the DDESB requirements that the FAA had not intended to propose. Specifically, footnote 3 of table E–7 in the NPRM, would have required sprinklers for Class 4 oxidizers inside a building. This final rule does not incorporate that requirement.

Regulatory Notices and Analyses

Changes to Federal regulations must undergo several analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small

[7] Although the NPRM characterized this as affecting operations rather than the siting of buildings, the FAA must note that it could apply to a site operator's initial planning because a site operator would be well advised to consider this formula when siting any bleachers for members of the public to view a launch.

[8] When the FAA reviewed these numbers using a more refined analysis, it found that the separation distance increments could be expressed with greater precision.

entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

In this final rule, the FAA is amending its explosive siting separation requirements. First, the FAA will dispense with separation distances for liquid oxygen, nitrogen tetroxide, and hydrogen peroxide in concentrations equal to or below 91 percent, if not stored within an intraline distance of another incompatible energetic liquid, and if not co-located on a launch vehicle. These are unnecessary because they duplicate the requirements of other regulatory regimes. Second, the FAA is decreasing required separation distances for division 1.1 explosives and liquid propellants with TNT equivalents that are less than or equal to 450 pounds, while maintaining a level of safety equivalent to current requirements. Third, the FAA is reducing separation distances for the storage and handling of division 1.3 explosives, while maintaining an equivalent level of safety to current requirements. Fourth, the FAA is dispensing with the separation distance requirements for storing liquid oxidizers and Class I, II and III flammable and combustible liquids because they duplicate the requirements of other regulatory regimes. The outcome of these changes is expected to be cost relieving. These amendments will allow the launch operator increased flexibility in site planning for the storage and handling of explosives. By encouraging existing launch sites to more effectively use their infrastructure, which could result in the additional co-location of launch sites with existing airports, the rule provides benefits (such as encouraging the development of more launch sites) and is cost relieving. By removing duplications, the amendments make the regulations less burdensome. There may be additional cost savings if the FAA issues fewer waivers as a result of this rule.

Under current part 420, the FAA does not distinguish between public areas that are buildings, where people are sheltered, and those where people are out in the open. This final rule will result in greater distances for some public areas than are required under current rules, but should not result in increased distances for siting buildings. The operational constraints themselves should not increase costs because a launch site operator currently must ensure under § 420.55 that its customers schedule their hazardous operations so as not to harm members of the public. A site operator may incur minimal costs in performing these new calculations and updating its procedures to reflect any changes in distances.

Other provisions will add clarity to the regulations and result in reduced ambiguity and confusion. Included are: dispensing with the hazard groups of tables E–3 through E–6 of appendix E of part 420 as a means of classification; changing the definition of explosive hazard facility, and adding definitions for energetic liquid, liquid propellant and maximum credible event. These provisions are cost neutral. The requirement that the explosive site map be at a scale sufficient to determine compliance with part 420 can be cost relieving because it can avoid time spent reviewing maps that are difficult to read or requesting that an applicant create and submit another map.

The FAA has, therefore, determined this final rule provides cost saving opportunities, is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The final rule will not increase and will likely reduce costs to industry because it provides options to launch sites with regards to explosive siting. It does not require launch site operators to increase the distances between where they have sited explosives and buildings. We did not receive comments regarding the initial regulatory flexibility analysis.

Therefore, as the acting FAA Administrator, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and

determined that it will have only a domestic impact.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The map requirement is not an increased burden in collecting information because the FAA already required a map. The FAA has determined that there is no new requirement for information collection associated with this final rule.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 310f and involves no extraordinary circumstances.

Executive Order Determinations

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

How To Obtain Additional Information

Rulemaking Documents

An electronic copy of a rulemaking document my be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/or*

3. Access the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 420

Launch sites, Reporting and recordkeeping requirements, Space transportation and exploration.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends Chapter III of Title 14, Code of Federal Regulations as follows:

PART 420—LICENSE TO OPERATE A LAUNCH SITE

■ 1. The authority citation for part 420 continues to read as follows:

Authority: 51 U.S.C. 50901–50923

■ 2. Amend § 420.5 by revising the definition of *Explosive hazard facility* and by adding the definitions of *Energetic liquid, Liquid propellant, Maximum credible event,* and *Public traffic route,* in alphabetical order to read as follows:

§ 420.5 Definitions.

* * * * *

Energetic liquid means a liquid, slurry, or gel, consisting of, or containing an explosive, oxidizer, fuel, or combination of the above, that may undergo, contribute to, or cause rapid exothermic decomposition, deflagration, or detonation.

* * * * *

Explosive hazard facility means a facility or location at a launch site where solid propellants, energetic liquids, or other explosives are stored or handled.

* * * * *

Liquid propellant means:

(1) A monopropellant on a launch vehicle or related device; or

(2) Incompatible energetic liquids co-located for purposes of serving as propellants on a launch vehicle or a related device where the incompatible energetic liquids are housed in tanks connected by piping for purposes of mixing.

Maximum credible event means a hypothesized worst-case accidental explosion, fire, or agent release that is likely to occur from a given quantity and disposition of explosives, chemical agents, or reactive material.

* * * * *

Public traffic route means any highway or railroad that the general public may use.

* * * * *

■ 3. Revise § 420.63 to read as follows:

§ 420.63 Explosive siting.

(a) Except as otherwise provided by paragraph (b) of this section, a licensee must ensure the configuration of the launch site follows its explosive site plan, and the licensee's explosive site plan complies with the requirements of §§ 420.65 through 420.70. The explosive site plan must include:

(1) A scaled map that shows the location of all explosive hazard facilities at the launch site and that shows actual and minimal allowable distances between each explosive hazard facility and all other explosive hazard facilities, each public traffic route, and each public area, including the launch site boundary;

(2) A list of the maximum quantity of energetic liquids, solid propellants and other explosives to be located at each explosive hazard facility, including explosive class and division;

(3) A description of each activity to be conducted at each explosive hazard facility; and

(4) An explosive site map using a scale sufficient to show whether distances and structural relationships satisfy the requirements of this part.

(b) A licensee operating a launch site located on a federal launch range does not have to comply with the requirements in §§ 420.65 through 420.70 if the licensee complies with the federal launch range's explosive safety requirements.

(c) For explosive siting issues not addressed by the requirements of §§ 420.65 through 420.70, a launch site operator must clearly and convincingly demonstrate a level of safety equivalent to that otherwise required by this part.

(d) A launch site operator may separate an explosive hazard facility from another explosive hazard facility, public area, or public traffic route by a distance different from one required by this part only if the launch site operator clearly and convincingly demonstrates a level of safety equivalent to that required by this part.

■ 4. Revise § 420.65 to read as follows:

§ 420.65 Separation distance requirements for handling division 1.1 and 1.3 explosives.

(a) *Quantity.* For each explosive hazard facility, a launch site operator must determine the total quantity of division 1.1 and 1.3 explosives as follows:

(1) A launch site operator must determine the maximum total quantity of division 1.1 and 1.3 explosives by class and division, in accordance with 49 CFR part 173, Subpart C, to be located in each explosive hazard facility where division 1.1 and 1.3 explosives will be handled.

(2) When division 1.1 and 1.3 explosives are located in the same explosive hazard facility, the total quantity of explosive must be treated as division 1.1 for determining separation distances; or, a launch site operator may add the net explosive weight of the division 1.3 items to the net explosive weight of division 1.1 items to determine the total quantity of explosives.

(b) *Separation of division 1.1 and 1.3 explosives and determination of distances.* A launch site operator must separate each explosive hazard facility where division 1.1 and 1.3 explosives are handled from all other explosive hazard facilities, all public traffic routes, and each public area, including the launch site boundary, by a distance no less than that provided for each quantity and explosive division in appendix E of this part as follows:

(1) For division 1.1 explosives, the launch site operator must use tables E–1, E–2, and E–3 of appendix E of this part to determine the distance to each public area and public traffic route, and to determine each intraline distance.

(2) For division 1.3 explosives, the launch site operator must use table E–4 of appendix E of this part to determine the distance to each public area and public traffic route, and to determine each intraline distance.

(c) *Separation distance by weight and table.* A launch site operator must:

(1) Employ no less than the public area distance, calculated under paragraph (b) of this section, to separate an explosive hazard facility from each public area, including the launch site boundary.

(2) Employ no less than an intraline distance to separate an explosive hazard facility from all other explosive hazard facilities used by a single customer. For explosive hazard facilities used by different customers a launch site operator must use the greater public area distance to separate the facilities from each other.

(3) Separate each public area containing any member of the public in the open by a distance equal to $-1133.9 + [389 * \ln(NEW)]$, where the NEW is greater than 450 pounds and less than 501,500 pounds.

(d) *NEW Quantities that Fall between Table Entries.* A launch site operator must, when determining a separation distance for NEW quantities that fall between table entries, use the equation provided by tables E–1, E–3, or E–4 of appendix E of this part.

(e) *Calculating Maximum Permissible NEW Given a Distance. A launch site operator must, when determining* a permissible quantity of explosives, calculate maximum permissible NEW using the equation of tables E–1, E–3, or E–4 of appendix E of this part.

■ 5. Add § 420.66 to read as follows:

§ 420.66 Separation distance requirements for storage of hydrogen peroxide, hydrazine, and liquid hydrogen and any incompatible energetic liquids stored within an intraline distance.

(a) *Separation of energetic liquids and determination of distances.* A launch site operator must separate each explosive hazard facility from each other explosive hazard facility, each public area, and each public traffic route in accordance with the minimum separation distance determined under this section for each explosive hazard facility storing:

(1) Hydrogen peroxide in concentrations of greater than 91 percent;

(2) Hydrazine;

(3) Liquid hydrogen; or

(4) Any energetic liquid that is:

(i) Incompatible with any of the energetic liquids of paragraph (a)(1) through (3) of this section; and

(ii) Stored within an intraline distance of any of them.

(b) *Quantity.* For each explosive hazard facility, a launch site operator must determine the total quantity of all energetic liquids in paragraph (a)(1) through (4) of this section as follows:

(1) The quantity of energetic liquid in a tank, drum, cylinder, or other container is the net weight in pounds of the energetic liquid in the container. The determination of quantity must include any energetic liquid in associated piping to any point where positive means exist for:

(i) Interrupting the flow through the pipe, or

(ii) Interrupting a reaction in the pipe in the event of a mishap.

(2) A launch site operator must convert the quantity of each energetic liquid from gallons to pounds using the conversion factors provided in table E–6 of appendix E of this part and the following equation:

Pounds of energetic liquid = gallons × density of energetic liquid (pounds per gallon).

(3) Where two or more containers of compatible energetic liquids are stored in the same explosive hazard facility, the total quantity of energetic liquids is the total quantity of energetic liquids in all containers, unless:

(i) The containers are each separated from each other by the distance required by paragraph (c) of this section; or

(ii) The containers are subdivided by intervening barriers that prevent mixing, such as diking.

(4) Where two or more containers of incompatible energetic liquids are stored within an intraline distance of each other, paragraph (d) of this section applies.

(c) *Determination of separation distances for compatible energetic liquids.* A launch site operator must determine separation distances for compatible energetic liquids as follows:

(1) To determine each intraline, public area, and public traffic route distance, a launch site operator must use the following tables in appendix E of this part:

(i) Table E–7 for hydrogen peroxide in concentrations of greater than 91 percent; and

(ii) Table E–8 for hydrazine and liquid hydrogen.

(2) For liquid hydrogen and hydrazine, a launch site operator must use the ''intraline distance to compatible energetic liquids'' for the energetic liquid that requires the greater distance under table E–8 of appendix E of this part as the minimum separation distance between compatible energetic liquids.

(d) *Determination of separation distances for incompatible energetic liquids.* If incompatible energetic liquids are stored within an intraline distance of each other, a launch site operator must determine the explosive equivalent in pounds of the combined liquids as provided by paragraph (d)(2) of this section unless intervening barriers prevent mixing.

(1) If intervening barriers prevent mixing, a launch site operator must separate the incompatible energetic liquids by no less than the intraline distance that tables E–7 and E–8 of appendix E of this part apply to compatible energetic liquids using the quantity or energetic liquid requiring the greater separation distance.

(2) A launch site operator must use the formulas provided in table E–5 of appendix E of this part, to determine the explosive equivalent in pounds of the combined incompatible energetic liquids. A launch site operator must then use the explosive equivalent in pounds requiring the greatest separation distance to determine the minimum separation distance between each explosive hazard facility and all other explosive hazard facilities and each public area and public traffic route as required by tables E–1, E–2 and E–3 of appendix E of this part.

■ 6. Revise § 420.67 to read as follows:

§ 420.67 Separation distance requirements for handling incompatible energetic liquids that are co-located.

(a) *Separation of energetic liquids and determination of distances.* Where incompatible energetic liquids are co-located in a launch or reentry vehicle tank or other vessel, a launch site operator must separate each explosive hazard facility from each other explosive hazard facility, each public area, and each public traffic route in accordance with the minimum separation distance determined under this section for each explosive hazard facility.

(b) *Quantity.* For each explosive hazard facility, a launch site operator must determine the total quantity of all energetic liquids as follows:

(1) The quantity of energetic liquid in a launch or reentry vehicle tank is the net weight in pounds of the energetic liquid. The determination of quantity must include any energetic liquid in associated piping to any point where positive means exist for:

(i) Interrupting the flow through the pipe; or

(ii) Interrupting a reaction in the pipe in the event of a mishap.

(2) A launch site operator must convert each energetic liquid's quantity from gallons to pounds using the conversion factors provided by table E–6 of appendix E of this part and the following equation:

Pounds of energetic liquid = gallons × density of energetic liquid (pounds per gallon).

(c) *Determination of separation distances for incompatible energetic liquids.* A launch site operator must determine separation distances for incompatible energetic liquids as follows:

(1) A launch site operator must use the formulas provided in table E–5 of appendix E of this part, to determine the explosive equivalent in pounds of the combined incompatible energetic liquids; and

(2) A launch site operator must then use the explosive equivalent in pounds to determine the minimum separation distance between each explosive hazard facility and all other explosive hazard facilities and each public area and public traffic route as required by tables E–1, E–2 and E–3 of appendix E of this part. Where two explosive hazard facilities contain different quantities, the launch site operator must use the quantity of liquid propellant requiring the greatest separation distance to determine the minimum separation distance between the two explosive hazard facilities.

(d) *Separation distance by weight and table.* For each explosive hazard facility, a launch site operator must:

(1) For an explosive equivalent weight from one pound through and including 450 pounds, determine the distance to any public area and public traffic route following table E–1 of appendix E of this part;

(2) For explosive equivalent weight greater than 450 pounds, determine the distance to any public area and public traffic route following table E–2 of appendix E of this part;

(3) Separate each public area containing any member of the public in the open by a distance equal to $-1133.9 + [389 * \ln(NEW)]$, where the NEW is greater than 450 pounds and less than 501,500 pounds;

(4) Separate each explosive hazard facility from all other explosive hazard facilities of a single customer using the intraline distance provided by table E–3 of appendix E of this part; and

(5) For explosive hazard facilities used by different customers, use the greater public area distance to separate the facilities from each other.

■ 7. Revise § 420.69 to read as follows:

§ 420.69 Separation distance requirements for co-location of division 1.1 and 1.3 explosives with liquid propellants.

(a) *Separation of energetic liquids and explosives and determination of distances.* A launch site operator must separate each explosive hazard facility from each other explosive hazard facility, each public traffic route, and each public area in accordance with the minimum separation distance determined under this section for each explosive hazard facility where division 1.1 and 1.3 explosives are co-located with liquid propellants. A launch site operator must determine each minimum separation distance from an explosive hazard facility where division 1.1 and 1.3 explosives and liquid propellants are to be located together, to each other explosive hazard facility, public traffic route, and public area as described in paragaphs (b) through (e) of this section.

(b) *Liquid propellants and division 1.1 explosives located together.* For liquid propellants and division 1.1 explosives located together, a launch site operator must:

(1) Determine the explosive equivalent weight of the liquid propellants by following § 420.67(c);

(2) Add the explosive equivalent weight of the liquid propellants and the net explosive weight of division 1.1 explosives to determine the combined net explosive weight;

(3) Use the combined net explosive weight to determine the distance to each

public area, public traffic route, and each other explosive hazard facility by following tables E–1, E–2, and E–3 of appendix E of this part; and

(4) Separate each public area containing any member of the public in the open by a distance equal to −1133.9 + [389 *ln(NEW)], where the net explosive weight is greater than 450 pounds and less than 501,500 pounds.

(c) *Liquid propellants and division 1.3 explosives located together.* For liquid propellants and division 1.3 explosives located together, a launch site operator must separate each explosive hazard facility from each other explosive hazard facility, public area, and public traffic route using either of the following two methods:

(1) *Method 1.* (i) Determine the explosive equivalent weight of the liquid propellants by following § 420.67(c);

(ii) Add to the explosive equivalent weight of the liquid propellants, the net explosive weight of each division 1.3 explosive, treating division 1.3 explosives as division 1.1 explosives;

(iii) Use the combined net explosive weight to determine the minimum separation distance to each public area, public traffic route, and each other explosive hazard facility by following tables E–1, E–2, and E–3 of appendix E of this part; and

(iv) Separate each public area containing any member of the public in the open by a distance equal to -1133.9 + [389 *ln(NEW)], where the net explosive weight is greater than 450 pounds and less than 501,500 pounds.

(2) Method 2. (i) Determine the explosive equivalent weight of each liquid propellant by following § 420.67(c);

(ii) Add to the explosive equivalent weight of the liquid propellants, the net explosive weight of each division 1.3 explosive to determine the combined net explosive weight;

(iii) Use the combined net explosive weight to determine the minimum separation distance to each public area, public traffic route, and each other explosive hazard facility by following tables E–1, E–2, and E–3 of appendix E of this part; and

(iv) Separate each public area containing any member of the public in the open by a distance equal to -1133.9 + [389 *ln(NEW)], where the net explosive weight is greater than 450 pounds and less than 501,500 pounds.

(d) *Liquid propellants and division 1.1 and 1.3 explosives located together.* For liquid propellants and division 1.1 and 1.3 explosives located together, a launch site operator must:

(1) Determine the explosive equivalent weight of the liquid propellants by following § 420.67(c);

(2) Determine the total explosive quantity of each division 1.1 and 1.3 explosive by following § 420.65(a)(2);

(3) Add the explosive equivalent weight of the liquid propellants to the total explosive quantity of division 1.1 and 1.3 explosives together to determine the combined net explosive weight;

(4) Use the combined net explosive weight to determine the distance to each public area, public traffic route, and each other explosive hazard facility by following tables E–1, E–2, and E–3 of appendix E of this part; and

(5) Separate each public area containing any member of the public in the open by a distance equal to -1133.9 + [389 *ln(NEW)], where the net explosive weight is greater than 450 pounds and less than 501,500 pounds

(e) *Use of maximum credible event analysis.* If a launch site operator does not want to employ paragraphs (b), (c), or (d) of this section, the launch site operator must analyze the maximum credible event (MCE) or the worst case explosion expected to occur. If the MCE shows there will be no simultaneous explosion reaction of the liquid propellant tanks and the solid propellant motors, the minimum distance between the explosive hazard facility and all other explosive hazard facilities and public areas must be based on the MCE.

■ 8. Add § 420.70 to read as follows:

§ 420.70 Separation distance measurement requirements.

(a) This section applies to all measurements of distances performed under §§ 420.63 through 420.69.

(b) A launch site operator must measure each separation distance along straight lines. For large intervening topographical features such as hills, the launch site operator must measure over or around the feature, whichever is the shorter.

(c) A launch site operator must measure each minimum separation distance from the closest hazard source, such as a container, building, segment, or positive cut-off point in piping, in an explosive hazard facility. When measuring, a launch site operator must:

(1) For a public traffic route distance, measure from the nearest side of the public traffic route to the closest point of the hazard source; and

(2) For an intraline distance, measure from the nearest point of one hazard source to the nearest point of the next hazard source. The minimum separation distance must be the distance for the quantity of energetic liquids or net explosive weight that requires the greater distance.

■ 9. Revise Appendix E to part 420 to read as follows:

Appendix E to Part 420—Tables for Explosive Site Plan

TABLE E–1—DIVISION 1.1 DISTANCES TO A PUBLIC AREA OR PUBLIC TRAFFIC ROUTE FOR NEW ≤450 LBS

NEW (lbs.)	Distance to public area (ft) [1,2]	Distance to public traffic route distance (ft) [2]
≤0.5	236	142
0.7	263	158
1	291	175
2	346	208
3	378	227
5	419	251
7	445	267
10	474	284
15	506	304
20	529	317
30	561	337
31	563	338
50	601	361
70	628	377
100	658	395
150	815	489
200	927	556
300	1085	651
450	1243	746

[1] To calculate distance d to a public area from NEW:

NEW ≤ 0.5 lbs: d = 236

0.5 lbs < NEW <100 lbs: d = 291.3 + [79.2 *ln(NEW)]

100 lbs ≤ NEW ≤ 450 lbs: d = -1133.9 + [389 *ln(NEW)]

NEW is in lbs; d is in ft; ln is natural logarithm.

To calculate maximum NEW given distance d (noting that d can never be less than 236 ft):

0 ≤ d < 236 ft: Not allowed (d cannot be less than 236 ft)

236 ft ≤d < 658 ft: NEW = exp [(d/79.2)-3.678]

658 ft ≤ d < 1250 ft: NEW = exp [(d/389) +2.914]

NEW is in lbs; d is in ft; exp[x] is e^x.

[2] The public traffic route distance is 60 percent of the distance to a public area.

TABLE E–2—DIVISION 1.1 DISTANCE TO PUBLIC AREA AND PUBLIC TRAFFIC ROUTE FOR NEW > 450 LBS

NEW (lbs)	Distance to public area (ft) [1]	Distance to public traffic route (ft)
450 lbs< NEW ≤ 30,000 lbs	1,250	750.
30,000 lbs< NEW ≤ 100,000 lbs	40*NEW 1/3	0.60*(Distance to Public Area).
100,000 lbs< NEW ≤ 250,000 lbs	2.42*NEW 0.577	0.60*(Distance to Public Area).
250,000 lbs< NEW	50*NEW 1/3	0.60*(Distance to Public Area).

[1] To calculate NEW from distance d to a public area:
1, 243 ft< d ≤ 1,857 ft: NEW = $d^3/64{,}000$
1, 857 ft< d ≤ 3,150 ft: NEW = $0.2162 * d^{1.7331}$
3,150 ft< d: NEW = $d^3/125{,}000$
NEW is in lbs; d is in ft.

TABLE E–3—DIVISION 1.1 INTRALINE DISTANCES[1,2,3]

NEW (lbs)	Intraline Distance (ft)
50	66
70	74
100	84
150	96
200	105
300	120
500	143
700	160
1,000	180
1,500	206
2,000	227
3,000	260
5,000	308
7,000	344
10,000	388
15,000	444
20,000	489
30,000	559
50,000	663
70,000	742
100,000	835
150,000	956
200,000	1,053
300,000	1,205
500,000 [3]	1,429
700,000	1,598
1,000,000	1,800
1,500,000	2,060
2,000,000	2,268
3,000,000	2,596
5,000,000	3,078

[1] To calculate intraline distance d from NEW:
d = 18*NEW 1/3
NEW is in pounds; d is in feet
[2] To calculate maximum NEW from given intraline distance d:
NEW = $d^3/5{,}832$
NEW is in pounds; d is in feet.
[3] NEW values of more than 500,000 lbs only apply to liquid propellants with TNT equivalents equal to those NEW values. The intraline distances for NEW greater than 500,000 pounds do not apply to division 1.1 explosives.

TABLE E–4—DIVISION 1.3 SEPARATION DISTANCES

NEW (lbs)	Distance to public area or public traffic route (ft) [1]	Intraline distance (ft) [2]
≤1000	75	50
1,500	82	56
2,000	89	61
3,000	101	68
5,000	117	80
7,000	130	88
10,000	145	98
15,000	164	112
20,000	180	122
30,000	204	138
50,000	240	163
70,000	268	181
100,000	300	204
150,000	346	234
200,000	385	260
300,000	454	303
500,000	569	372
700,000	668	428
1,000,000	800	500
1,500,000	936	577
2,000,000	1,008	630

[1] To calculate distance d to a public area or traffic route from NEW:
NEW ≤1,000lbs
d= 75 ft
1,000 lbs< NEW ≤ 96,000 lbs
$d=\exp[2.47 + 0.2368*(\ln(NEW)) + 0.00384*(\ln(NEW))^2]$
96,000 lbs< NEW ≤1,000,000 lbs
$d = \exp[7.2297 - 0.5984*(\ln(NEW)) + 0.04046*(\ln(NEW))^2]$
NEW > 1,000,000 lbs
d = 8*NEW 1/3
NEW is in pounds; d is in feet; exp[x] is e^x; ln is natural logarithm.
To calculate NEW from distance d to a public area or traffic route (noting that d cannot be less than 75 ft):

$0 \leq d < 75$ ft:
Not allowed (d cannot be less than 75 ft) for NEW ≤ 1000 lbs
75 ft ≤ d≤ 296 ft
NEW = exp[−30.833 + (307.465 + 260.417*(ln(d)))½]
296 ft< d≤ 800 ft
NEW = exp[7.395 + (−124.002 + 24.716*(ln(d)))½]
800 ft< d
NEW = $d^3/512$
NEW is in lbs; d is in ft; exp[x] is e^x; ln is natural logarithm
[2] To calculate intraline distance d from NEW:
NEW ≤ 1,000 lbs
d = 50 ft
1,000 lbs< NEW ≤ 84,000 lbs
$d=\exp[2.0325 + 0.2488*(\ln(NEW)) + 0.00313*(\ln(NEW))^2]$
84,000 lbs< NEW ≤ 1,000,000 lbs
$d= \exp[4.338 - 0.1695*(\ln(NEW)) + 0.0221*(\ln(NEW))^2]$
1,000,000 lbs< NEW
$d =5*NEW^{1/3}$
NEW is in pounds; d is in feet; exp[x] is e^x; ln is natural logarithm
To calculate NEW from an intraline distance d:
$0 \leq d < 50$ ft:
Not allowed (d cannot be less than 50 ft) for NEW ≤ 1000 lbs
50 ft ≤ d≤ 192 ft
NEW = exp[−39.744 + (930.257 + 319.49*(ln(d)))½]
192 ft<d≤ 500 ft
NEW = exp[3.834 + (−181.58 + 45.249*(ln(d)))½]
500 ft≤d
NEW = $d^3/125$
NEW is in pounds; d is in feet; exp[x] is e^x; ln is natural logarithm

TABLE E–5—ENERGETIC LIQUID EXPLOSIVE EQUIVALENTS[1,2,3]

Energetic liquids	TNT Equivalence	TNT Equivalence
	Static Test Stands	Launch Pads.
LO_2/LH_2	See Note 3	See Note 3.
LO_2/LH_2 + LO_2/RP–1	Sum of (see Note 3 for LO_2/LH_2) + (10% for LO_2/RP1).	Sum of (see Note 3 for LO_2/LH_2) + (20% for LO_2/RP1).
LO_2/RP–1	10%	20% up to 500,000 lbs Plus 10% over 500,000 lbs
IRFNA/UDMH	10%	10%.
N_20_4/UDMH + N_2H_4	5%	10%.

[1] A launch site operator must use the percentage factors of table E–5 to determine TNT equivalencies of incompatible energetic liquids that are within an intraline distance of each other.
[2] A launch site operator may substitute the following energetic liquids to determine TNT equivalency under this table as follows:
Alcohols or other hydrocarbon for RP–1
H_2O_2 for LO_2 (only when H_2O_2 is in combination with RP–1 or equivalent hydrocarbon fuel)
MMH for N_2H_4, UDMH, or combinations of the two.
[3] TNT equivalency for LO_2/LH_2 is the larger of:
(a) TNT equivalency of $8*W^{2/3}$, where W is the weight of LO_2/LH_2 in lbs; or
(b) 14 percent of the LO_2/LH_2 weight.

TABLE E–6—FACTORS TO USE WHEN CONVERTING ENERGETIC LIQUID DENSITIES

Item	Density (lb/gal)	Temperature (°F)
Ethyl alcohol	6.6	68
Hydrazine	8.4	68
Hydrogen peroxide (90 percent)	11.6	68
Liquid hydrogen	0.59	−423
Liquid oxygen	9.5	−297
Red fuming nitric acid (IRFNA)	12.9	77
RP–1	6.8	68
UDMH	6.6	68
UDMH/Hydrazine	7.5	68

TABLE E–7—SEPARATION DISTANCE CRITERIA FOR STORAGE OF HYDROGEN PEROXIDE IN CONCENTRATIONS OF MORE THAN 91 PERCENT[1,2]

Quantity (lbs)	Intraline distance or distance to public area or distance to public traffic route (ft)
10,000	510
15,000	592
20,000	651
30,000	746
50,000	884
70,000	989
100,000	1114
150,000	1275
200,000	1404
300,000	1607
500,000	1905

[1] Multiple tanks containing hydrogen peroxide in concentrations of greater than 91 percent may be located at distances less than those required by table E–7; however, if the tanks are not separated from each other by 10 percent of the distance specified for the largest tank, then the launch site operator must use the total contents of all tanks to calculate each intraline distance and the distance to each public area and each public traffic route.

[2] A launch site operator may use the equations below to determine permissible distance or quantity between the entries of table E–7:

W > 10,000 lbs Distance = 24 * $W^{1/3}$

Where Distance is in ft and W is in lbs.

To calculate weight of hydrogen peroxide from a distance d:

d > 75 ft

$W = \exp[-134.286 + 71.998*(\ln(d)) - 12.363*(\ln(d))^2 + 0.7229*(\ln(d))^3]$

TABLE E–8—SEPARATION DISTANCE CRITERIA FOR STORAGE OF LIQUID HYDROGEN AND BULK QUANTITIES OF HYDRAZINE

Pounds of energetic liquid	Pounds of energetic liquid	Public area and intraline distance to incompatible energetic liquids	Intraline distance to compatible energetic liquids	Pounds of energetic liquid	Pounds of energetic liquid	Public area and intraline distance to incompatible energetic liquids	Intraline distance to compatible energetic liquids
Over	Not Over	Distance in feet	Distance in feet	Over	Not Over	Distance in feet	Distance in feet
				60,000	70,000	1,200	130
100	200	600	35	70,000	80,000	1,200	130
200	300	600	40	80,000	90,000	1,200	135
300	400	600	45	90,000	100,000	1,200	135
400	500	600	50	100,000	125,000	1,800	140
500	600	600	50	125,000	150,000	1,800	145
600	700	600	55	150,000	175,000	1,800	150
700	800	600	55	175,000	200,000	1,800	155
800	900	600	60	200,000	250,000	1,800	160
900	1,000	600	60	250,000	300,000	1,800	165
1,000	2,000	600	65	300,000	350,000	1,800	170
2,000	3,000	600	70	350,000	400,000	1,800	175
3,000	4,000	600	75	400,000	450,000	1,800	180
4,000	5,000	600	80	450,000	500,000	1,800	180
5,000	6,000	600	80	500,000	600,000	1,800	185
6,000	7,000	600	85	600,000	700,000	1,800	190
7,000	8,000	600	85	700,000	800,000	1,800	195
8,000	9,000	600	90	800,000	900,000	1,800	200
9,000	10,000	600	90	900,000	1,000,000	1,800	205
10,000	15,000	1,200	95	1,000,000	2,000,000	1,800	235
15,000	20,000	1,200	100	2,000,000	3,000,000	1,800	255
20,000	25,000	1,200	105	3,000,000	4,000,000	1,800	265
25,000	30,000	1,200	110	4,000,000	5,000,000	1,800	275
30,000	35,000	1,200	110	5,000,000	6,000,000	1,800	285
35,000	40,000	1,200	115	6,000,000	7,000,000	1,800	295
40,000	45,000	1,200	120	7,000,000	8,000,000	1,800	300
45,000	50,000	1,200	120	8,000,000	9,000,000	1,800	305
50,000	60,000	1,200	125	9,000,000	10,000,000	1,800	310

Issued in Washington, DC, on August 24, 2012.

Michael P. Huerta,

Acting Administrator.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 200, 207, and 232

[Docket No. FR–5465 F–02]

RIN–2502–AJ05

Federal Housing Administration (FHA): Section 232 Healthcare Facility Insurance Program-Strengthening Accountability and Regulatory Revisions Update

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: In 2010 through 2011, HUD commenced and completed the process of revising regulations applicable to, and closing documents used in, FHA insurance of multifamily rental projects, to reflect current policy and practices in the multifamily mortgage market. This final rule results from a similar process that was initiated in 2011 for revising and updating the regulations governing, and the transactional documents used in, the program for insurance of healthcare facilities under section 232 of the National Housing Act (Section 232 program). HUD's Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. This rule revises the Section 232 program regulations to reflect current policy and practices, and improve accountability and strengthen risk management in the Section 232 program.

DATES: *Effective* October 9, 2012.

FOR FURTHER INFORMATION CONTACT: Kelly Haines, Director, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6264, Washington, DC 20410–8000; telephone number 202–708–0599 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

I. Supplementary Information

A. Background

Section 232 of the National Housing Act (12 U.S.C. 1715w) (Section 232) authorizes FHA to insure mortgages made by private lenders to finance the development of nursing homes, intermediate care facilities, board and care homes, and assisted living facilities (collectively, residential healthcare facilities). The Section 232 program allows for long-term, fixed-rate financing for new and rehabilitated properties for up to 40 years. Existing properties without rehabilitation can be financed with or without Ginnie Mae®[1] Mortgage Backed Securities for up to 35 years. Eligible borrowers under the Section 232 program include investors, builders, developers, public entities, and private nonprofit corporations and associations. The documents executed at loan closing provide that the borrower may not engage in any other business or activity.

The maximum amount of the loan for new construction and substantial rehabilitation is equal to 90 percent (95 percent for nonprofit organization sponsors) of the estimated value of physical improvements and major movable equipment. For existing projects, the maximum is 85 percent (90 percent for nonprofit organization sponsors) of the estimated value of the physical improvements and major movable equipment.

As the need for residential care facilities increased, requests to FHA to make mortgage insurance available for such facilities also increased. As with any program growth, updates to regulations are needed to ensure that program requirements are sufficient to meet increased demand, and prevent mortgage defaults that not only impose a risk to the FHA insurance fund but can also jeopardize the safety and stability of Section 232 facilities and their residents. HUD's regulations governing the Section 232 program are primarily codified in 24 CFR part 232.

B. The Proposed Rule

On May 3, 2012, HUD published a proposed rule at 77 FR 26218, in which it submitted, for public comment, revisions to the Section 232 program regulations. On May 3, 2012, HUD also published a notice at 77 FR 26304, which proposed revisions to the related documents used in the insurance of healthcare facilities under the Section 232 program. In the May 3, 2012, rule, HUD proposed regulatory revisions that would update terminology, require a single asset form of ownership, and reflect current policy and practices used in healthcare facility transactions today. The updates included in the proposed rule also included amendments to HUD's Uniform Financial Reporting Standards to include operators of projects insured or held by HUD as entities that must submit financial reports. In addition, in the May 3, 2012 rule, HUD proposed several revisions to strengthen borrower eligibility requirements, as well as HUD's oversight of the healthcare program and projects.

With respect to proposed revisions to the Section 232 documents, published in the May 3, 2012, notice, HUD will address public comments and advise of any changes through separate publication.

C. Key Changes Made at the Final Rule Stage

In response to comments, HUD made several changes to the regulatory text proposed by the May 3, 2012, rule. Key changes made at the final rule stage include the following:

Transition period for compliance. For several of the new or updated regulatory provisions in this final rule, HUD provides a transition period of 6 months before compliance with the requirements become applicable. The final rule, at § 232.1(b), lists which regulatory sections become applicable 6 months after publication of this final rule.

Removal of an across-the-board long-term debt service reserve. The final rule removes the across-the-board requirement, proposed in the May 3, 2012, rule, to establish and maintain a long-term debt service reserve. The requirement was designed to provide a borrower facing operating difficulties, at any time throughout the life of the mortgage, the time to arrange a workout plan by providing a source of funds from which the borrower could make debt service payments and thus delay or avoid an insurance claim by the lender. Several commenters objected to the across-the-board nature of this reserve, and offered various alternatives to provide such additional time for workouts. Commenters recommended addressing the timing issues directly and expanding the time periods involved in a lender's submission of a claim for insurance and HUD's processing of such a claim. This recommendation builds from similar revisions implemented through the updates to the multifamily rental

[1] Ginnie Mae is a registered service mark of the Government National Mortgage Association; see *http://www.ginniemae.gov/.*

housing program regulations and documents.

This final rule adopts this recommendation. The final rule provides, at § 232.11, that the long-term debt service reserve will be required only in cases where HUD determines a need for such a reserve. HUD anticipates that requiring a long-term debt service reserve will be the exception and not the norm. HUD may require such a reserve when underwriting determines there is an atypical long-term project risk. Atypical long-term risks could occur, for example, in circumstances in which there is an unusually high mortgage amount, or when some other risk mitigant, such as a master lease structure typically used in a portfolio transaction, is unavailable in a particular transaction.

Removal of requirement for segregation of operators accounts. In the proposed rule, HUD included several provisions requiring the segregation of operator accounts to address the need to isolate a particular healthcare facility's financial transactions from an account where the facility's funds have been commingled with the funds of other facilities. Commenters pointed out that the proposed approach differs from industry practice, is more costly, and is unnecessary in light of available accounting software systems. HUD agrees that accounting software available today is designed to accomplish the interests that HUD identified, and HUD has therefore eliminated the account segregation requirements in this final rule. (See § 232.1013.) Additionally, operator compliance with the new financial reports required under the new 24 CFR 5.801, which was included in the proposed rule and remains in this final rule, will necessitate that the operator maintain accounts in a manner that will allow HUD and the lender to discern the funds attributable to the facility.

Revision of requirement to maintain positive working capital at all times. The proposed rule included provisions that would have required operators to maintain positive ''working capital'' at all times. In response to commenters' concerns that this requirement is inconsistent with other program obligations, and is infeasible, the final rule addresses working capital, at § 232.1013, by prohibiting the distribution, advance, or otherwise use of funds attributable to the insured facility, for any purpose other than operating the facility, if the quarterly/year-to-date financial statement demonstrates negative working capital. The prohibition remains in place until a quarterly/year-to-date financial statement demonstrating positive working capital is submitted to HUD. In brief, the final rule provides that HUD will monitor an operator's distribution of funds through its quarterly financial statements to ensure that the facility is positioned to withstand distributions.

Removal of prohibition on payments to borrower principals without prior HUD approval. The proposed rule provided that no principal of the borrower entity would receive payment of funds (e.g., a salary) derived from operation of the project, other than from permissible distributions, without HUD approval. The final rule removes the prohibition against payment to principals of the borrower without HUD approval (§ 232.1009 at the proposed rule stage), as other sections of the regulations adequately address the issue of circumvention of distribution limitations. For example, § 232.1007 of the final rule requires that the costs of goods and services purchased or acquired in connection with the project be reasonable and reflect market prices, which provides HUD with adequate protection in regard to the level of principals' salaries or other compensation.

Removal of HUD approval of any revisions to management agreements. The proposed rule would have required HUD to approve both initial management agreements, as well as revisions to the management agreements. HUD has determined to retain the requirement for initial approval of management agent agreements, but, in light of the inclusion of the limitation, in § 232.1007, that goods and services be in line with the market, will require approval of only those revisions that are material. (See § 232.1011 of this final rule.)

Removal of HUD approval of any commercial lease or sublease. The proposed rule would have required, at § 232.1013, an operator to obtain HUD approval of any commercial lease or sublease. In response to commenters' concerns that changing industry needs and practices (e.g., the inclusion of beauty salons in nursing homes) often necessitated leasing and subleasing, HUD has determined to remove the restriction.

Establishing date of default for mortgages insured under Section 232. The final rule clarifies the amendments made to § 207.255 at the proposed rule stage by defining the date of default for Section 232 insured mortgages.

Other changes. In addition to the changes discussed above, the final rule also—

- Provides for flexibility in § 5.801 (uniform financial reporting standards) in the format and manner, as determined by HUD, that financial reports may be submitted to HUD, to the lender or other third party as HUD may direct;
- Adds language to § 200.855, which was inadvertently omitted from the regulatory text but discussed in the preamble to the proposed rule at 77 FR 26222, and that exempted assisted living facilities, board and care facilities and intermediate care facilities from inspections by HUD's Real Estate Assessment Center (REAC) if the State or local government has a reliable inspection system in place.
- In § 207.258, defines, in paragraph (a) the ''Eligibility Notice Period,'' adds a new paragraph (a)(4) to provide for acknowledgment by HUD of the lender's election either to assign its mortgage or acquire and convey title to HUD, and removes language from the opening clause of paragraph (b)(1)(i), which was added in the update of the multifamily project rental regulations, but is no longer applicable;
- Removes the definition of ''mortgaged property'' in § 232.9 of the proposed rule, as well as the definition section in new subpart F, § 232.1003 of the proposed rule, because these terms are defined in the transactional documents and HUD agreed with commenters to limit transfer of certain terminology from the transactional documents to the regulations;
- Moves the definition of eligible operator set forth in the proposed rule to a separate regulatory provision at § 232.1003, which establishes the eligibility requirements for operators in the Section 232 program;
- Withdraws the amendments proposed to be made to § 232.251 regarding other applicable regulations, since the final rule addresses this issue in § 232.1.

II. Discussion of Public Comments

The public comment period for this rule closed on July 2, 2012, and HUD received 27 public comments through the *www.regulations.gov* Web site. Comments were submitted, through this governmentwide portal, by a wide variety of parties including: Commercial mortgage bankers; companies that own, manage, and operate skilled nursing facilities and assisted living facilities; national and state healthcare associations; and a federation of state associations representing nonprofit and proprietary long-term care providers, including nursing and assisted living facilities. Comments were also submitted by a coalition of national investment and mortgage bankers that participate in HUD's healthcare

programs, as well as a trade association of lenders and a coalition of national senior residential and healthcare associations. The ''HUD Practice Committee'' submitted comments on behalf of the Forum on Affordable Housing and Community Development Law of the American Bar Association. Private individuals also submitted comments. As a special outreach to the public on proposed changes to the Section 232 regulations, HUD hosted a forum, the ''Section 232 Document and Proposed Rule Forum'' on May 31, 2012, in Washington, DC. A video of this forum is available on the HUD internet site at *http://portal.hud.gov/hudportal/HUD?src=/press/multimedia/videos*. While comments were raised and discussed at the forum, as reflected in the video, HUD encouraged forum participants to file written comments through the *www.regulations.gov* Web site so that all comments would be more easily accessible to interested parties. All comments, whether submitted through *www.regulations.gov* or raised at the forum, were considered in the development of this final rule.

This section of the preamble presents significant issues, questions, and suggestions submitted by public commenters, and HUD's responses to these issues, questions, and suggestions.

General Comments

Several commenters expressed their general support for the rule as improvements that are necessary and beneficial, stating that the rule provided the appropriate balance of risk mitigation while not overly burdening the borrower and operator or substantially altering demand for the program. Commenters also stated that several of the modifications, such as the limitation on REAC inspections and modification of the borrower surplus cash rules, were beneficial.

Notwithstanding the general support for the rule's objectives, one commenter objected to the rule overall, and other commenters offered suggested changes to several of the rule's provisions.

Comment: HUD's regulatory changes to the Section 232 program will deter participation by third-party operators. A commenter stated that the totality of HUD's regulatory scheme will discourage third-party (non-identity-of-interest) operators from participating in the Section 232 program.

HUD Response: As stated in the preamble of the May 3, 2012, proposed rule, operators now carry out significant day-to-day duties in the administration of healthcare facilities (as opposed to when the regulations were first promulgated in the 1970s), and this important role needs to be explicitly addressed in regulation. However, while seeking to ensure, through establishment of regulations, the requisite accountability by operators participating in the Section 232 program, it was not HUD's intent to deter participation by responsible operators. In response to public comment, HUD has made several changes at this final rule stage that address concerns that the requirements proposed to be imposed on operators are too stringent.

Comment: Make the final regulations effective as of the date that applications are received. A commenter stated that HUD should make the effective date of the final regulations the date that applications for insurance are received by HUD, rather than the date the firm commitment is issued.

HUD Response: As already discussed in this preamble, the final rule provides a 6-month transition period before compliance with several of the regulatory provisions becomes applicable. Section 232.1 of the final rule identifies the regulatory sections for which HUD provides a transition period but the transition period is linked to the date for which a firm commitment has been issued. Specifically, § 232.1(b) of the final rule provides that the identified regulatory sections will become applicable only to transactions for which a firm commitment has been issued on or after the date that is 6 months following publication of this final rule.

HUD is basing the transition period on the date for which a firm commitment has been issued and not on the date that the application for insurance is received, because significant barriers exist to applying the regulations based on the date for application for insurance. Applications are often less than fully complete when initially received and current program systems lack the capability to determine and memorialize when an application is deemed fully complete. HUD therefore believes that basing the transition period on issuance of the firm commitment is the correct approach.

Comment: Place program requirements in administrative guidance, not in regulation. Commenters stated that several executive orders, such as Executive Orders 12866 and 13563, provide that ''[F]ederal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.'' Commenters suggested that unnecessary regulations could be addressed by publishing requirements in administrative guidance as opposed to in rules. These commenters suggested that HUD add the phrase ''as otherwise permitted or approved by HUD'' in various sections of the regulations to provide both industry and HUD with greater flexibility.

Commenters stated that several of the proposed regulatory changes would limit program flexibility with respect to process improvements, such as those recently embraced by HUD, in administering the Section 232 programs and achieved through nonrulemaking documents. A commenter also stated that including the debt service reserve in the regulations is not the ''best, most innovative, or least burdensome'' method for achieving HUD's goals.

HUD Response: The regulations provided in this final rule are those that HUD determined are necessary for purposes of updating and strengthening the Section 232 program, and are those which should not, or are likely not to, change frequently. However, as discussed below in responses to comments on specific provisions, HUD has identified certain proposed regulatory provisions, and HUD agreed with the commenters that the provisions did not need to be included in regulation.

Uniform Financial Reporting Standards (24 CFR Part 5; § 5.801)

The proposed rule offered revisions to the reporting requirements of 24 CFR 5.801 to include operators of projects with mortgages insured or held by HUD under the Section 232 program as entities that must submit financial reports. Under current requirements, financial reports are submitted by borrowers, but not operators of Section 232 insured healthcare facilities. HUD had determined that the audited financial statements of a borrower were not sufficient to assess the financial status of a Section 232 project, because the viability of the project is heavily dependent on the operator's financial performance, and the financial statements of the operator should also be reviewed for an accurate assessment of the project's financial status.

The May 3, 2012, rule proposed to retain the longstanding requirement that owners submit audited financial statements annually and proposed to require operators to submit financial statements quarterly, covering separately the most recent quarter and the fiscal year to date.

Comment: Extend the financial report submission deadline. A commenter suggested that HUD should extend the financial report submission deadline in § 5.802(c)(4) from within 30 days of the

end of each quarterly reporting period to within 60 days of the end of each quarterly reporting period to provide operators sufficient time to submit required financial information. The commenter also suggested clarifying revisions with respect to the financial reporting requirements that apply when the borrower is also the operator. The commenter stated that the purpose of these suggested changes to the proposed rule was to eliminate duplicative submissions by the borrower and duplicative review by HUD that would result if the borrower were required to submit an annual unaudited financial statement followed shortly thereafter by submission of an annual audited financial statement.

The commenter also proposed that the financial reporting requirements set forth in this section should apply only to those projects that are governed by the new Section 232 loan documents and that received a firm commitment on or after the effective date of final regulations. The commenter suggested revised language in 24 CFR 5.802(d)(4) to limit the application of this section. The commenter stated that without this limiting language, the reporting standards would be retroactively applied to operators of existing insured projects that are not currently subject to these financial reporting requirements under the terms of the mortgage loan transaction documents and regulations in effect at the time the loan closed.

HUD Response: HUD declines to accept the commenter's recommendation to extend the timing for the submission of all reports from 30 to 60 days. Receipt of the unaudited quarterly and year-to-date operator financial statements promptly at the end of each quarter is needed for effective monitoring of a property's financial operations and the trend of those operations. However, in recognition of the intricacies involved in developing year-end financial statements, HUD has extended the submission of the final quarter and year-to-date operator-certified statements submitted for the 4th fiscal year quarter to 60 calendar days following the end of the fiscal year.

Due to the same need for effective financial oversight, HUD also declines to accept the commenter's recommendation to eliminate separate year-end operator quarterly and year-to-date reports when the borrower is also the operator. Operator reports will be submitted in separate systems that allow for more prompt submission than audited reports, and therefore HUD will receive timely and important trend information.

With respect to the commenter's statement that the requirements should be applied only to those projects that are governed by the new Section 232 loan documents and that received a firm commitment on or after the effective date of final regulations, HUD declines to adopt the change. As stated in the preamble to the proposed rule, HUD determined that the financial statements that HUD currently receives are insufficient to assess the financial status of a Section 232 project. The viability of the project is heavily dependent on the operator's financial performance, and this information is not currently part of financial reports on Section 232 projects. HUD is requiring this information to improve the accuracy of its assessment of a project's financial status, and thus the solvency of the fund. Application of these financial reporting requirements to existing facilities is consistent with authority provided in paragraph 3 of most, if not all of the existing operators' regulatory agreements that provide for the Secretary to request financial reports. This rule implements such a request through regulation. Receipt of these reports will significantly improve HUD's ability to manage and maintain the finances of the FHA insurance fund.

Introduction to FHA Programs: Physical Condition of Multifamily Properties (24 CFR Part 200, Subpart P)

Physical Condition Standards and Physical Inspection Requirements (§ 200.855)

The proposed rule would have narrowed and streamlined the scope of Section 232 facilities that are routinely inspected by REAC. In particular, the proposed rule provided that facilities such as assisted living facilities and board and care facilities, and properties that are routinely surveyed pursuant to regulations of the Centers for Medicare and Medicaid Services, would not be subject to routine REAC inspections if the State or local government had a reliable and adequate inspection system in place. The remainder of the Section 232 properties would be inspected only when and if HUD determined, on a case-by-case basis and on the basis of information received, that inspection of such facility is needed to help ensure the protection of residents or the adequate preservation of the project.

Comment: Support for the proposed changes. A commenter representing a federation of state associations of nonprofit care providers expressed support for the proposed changes, which the commenter characterized as the REAC multifamily standards, and described such standards as suitable for apartment buildings, but unsuitable for healthcare facilities. Another commenter expressed agreement that facilities should be exempt from the FHA physical inspection requirements on the grounds that the State inspection is thorough and sufficient. The commenter also stated that in addition to the dollars savings outlined in the proposed rule, the exemption would eliminate the conflict between the HUD inspection requirements and the State requirements. The commenter stated that this approach would relieve the facilities of the administrative burden of continually asking for exceptions or waivers to address those conflicts.

HUD Response: HUD appreciates the commenters' support of this regulatory change.

Multifamily Housing Mortgage Insurance (24 CFR Part 207)

Contract Rights and Obligations (Subpart B)

Subpart B of the part 207 regulations addresses contract rights and obligations and the rights and duties of the mortgagee under contract of insurance, and HUD determined that certain revisions were necessary as part of its updating of regulations applicable to the Section 232 program.

Defaults (§ 207.255)

The proposed rule's revisions to § 207.255, ''Defaults for purposes of insurance claim,'' included language defining the date of defaults. The proposed rule would have revised § 207.255(a)(4) by clarifying the dates on which certain monetary and other defaults occur.

Date of Default (§ 207.255(a)(4)(ii))

Comment: Revise the Date of Default. A commenter stated that 24 CFR 207.255(a)(4)(ii) requires revision to take into consideration HUD's ability to prevent the lender from accelerating the debt due to a covenant event of default. The commenter stated that this proposed change is appropriate because the lender is not able to control the time period between when a violation occurs and the date of an assignment.

HUD Response: HUD agrees with the commenter that the Date of Default for a covenant default should not be the date on which the underlying covenant violation occurs, but for reasons different than those advanced by the commenter. In addition, the language in § 207.255(a)(4) is not intended to apply to loans insured under Section 232, and, as stated in the proposed rule, HUD proposed to adjust the language that

currently reads ''for purposes of paragraph (b) of this section,'' to read ''for purposes of paragraph (a) of this section.'' Therefore, the comment actually relates to the similar language set forth in § 207.255(b)(4)(i), and in response to this comment, HUD is adding § 207.255(b)(5), which applies to mortgages insured under Section 232, to clarify the dates of default applicable to the Section 232 program.

In the final rule, HUD also specifies that a covenant violation does not become a default for purposes of payment of an insurance claim until the lender has accelerated the debt and the borrower has failed to make that accelerated debt payment. Namely, the regulation now provides that for mortgages insured under Section 232, the date of default shall be considered as: (a) The first date on which the borrower has failed to pay the debt when due as a result of the lender's acceleration of the debt because of the borrower's uncorrected failure to perform a covenant or obligation under the regulatory agreement or security instrument; or (b) the date of the first failure to make a monthly payment, which subsequent payments by the borrower are insufficient to cover when applied to the overdue monthly payments in the order in which they become due.

Section 207(g) of the National Housing Act (12 U.S.C. 1713(g)) provides the authority for payment of a claim for mortgage insurance benefits. Pursuant to that statutory provision, there must be a monetary default in order for the mortgagee to become eligible to receive mortgage insurance benefits. Therefore, the date of default for purposes of payment of a claim, premised on a covenant violation, must be associated with a monetary default. A covenant violation does not become a default for purposes of payment of an insurance claim until the lender has accelerated the debt and the borrower has failed to make that accelerated debt payment. In light of the statutory language and pursuant to HUD's regulation at § 207.255(b), a covenant violation does not become a default until after the mortgagee has accelerated the debt. Accordingly, the date of default referenced in § 207.255(b)(5)(i) should be read to directly correlate to the default referenced in § 207.255(b)(1)(ii); e.g., associated with the acceleration of the debt.

Corrective Change (§ 207.255(b)(3))

HUD did not propose any revisions to § 207.255 in the May 3, 2012, proposed rule. Despite the fact that HUD did not seek comment on this section, one commenter proposed that HUD modify § 207.255(b)(3) to remove the general reference, and limit it to § 207.255(b)(1).

Comment: Revise the references. A commenter suggested that HUD remove the reference to ''paragraph (b)'' and replace this reference with a more limiting reference to ''paragraph (b)(1)''. Paragraph (b) of § 207.255 describes the actions constituting a default applicable to multifamily mortgages for which HUD issued a firm commitment for mortgage insurance before September 1, 2011, and for multifamily projects insured under section 232 of the Act (12 U.S.C. 1715w) and section 242 of the Act (12 U.S.C. 1715z–7). Paragraph (b)(1) provided categories of mortgages covered by the default provisions. In the regulatory revisions of the May 3, 2012, proposed rule, HUD restructured § 207.255 to provide in § 207.255(a) for a ''two–tiered'' default and in new paragraph (a)(5) for a ''grandfathering'' of multifamily projects for which firm commitments were issued before September 1, 2011, and for mortgages issued under sections 232 and 242.

HUD Response: HUD is not accepting the suggested change. The revised regulation at 24 CFR 207.255(b)(3) is accurate.

Insurance Claim Requirements (§ 207.258)

The May 3, 2012, rule proposed to modify § 207.258, ''Insurance claim requirements,'' by further clarifying in paragraph (a)(2) the applicability of the lockout and prepayment premium periods. The May 3, 2012, rule also proposed to modify § 207.258(b)(1)(i) by clarifying the time period within which a mortgagee may elect to assign a mortgage insured under section 232 of the Act to the Commissioner.

Comment: Proposed change to claims process delays payment of the claim. A commenter expressed opposition to the revision to the claims process. The commenter stated that a lender may not file its application for insurance until ''HUD acknowledges the notice of election.'' The commenter stated that HUD could now delay payment of a claim by refusing to provide acknowledgment of the notice. The commenter stated that this provision undercuts the incontestability of the FHA insurance, as provided in the National Housing Act (12 U.S.C. 1706c(e)), by implementing a practical barrier to the realization of the lender's insurance benefits. The commenter stated that this requirement allows HUD to deny benefits to a lender even though the lender has followed all claims processing requirements.

HUD Response: HUD declines to accept the commenter's recommendation. The imposition of a waiting period does not undercut the incontestability of the FHA insurance, as suggested by the commenter. Receipt of FHA insurance benefits is not instantaneous, because certain procedures must be followed. Where there have been delays in a lender's receipt of insurance benefits or rejections of a lender's claim, it is HUD's experience that such outcomes were due to the lender not meeting program requirements; for example, impermissible liens on the property having not been resolved.

Mortgage Insurance for Nursing Homes, Intermediate Care Facilities, Board and Care Homes, and Assisted Living Facilities (24 CFR Part 232)

Nomenclature Change

In its review of the regulations in 24 CFR part 232, HUD noted that the regulations use both the terms ''borrower'' and ''mortgagor.'' These terms have the same meaning, and to avoid any misunderstanding that they have different meanings, the May 3, 2012, rule proposed to substitute the term ''borrower'' for ''mortgagor'' throughout the part 232 regulations. That said, the healthcare financing and transactional documents for the Section 232 program may sometimes refer to the borrower as the ''mortgagor,'' ''lessor,'' and/or the ''owner.''

Eligibility Requirements (Subpart A)

Eligible Borrower (§ 232.3)

The May 3, 2012, rule proposed to revise the definition of eligible borrower to provide that the borrower shall be a single asset entity, determined acceptable to the Commissioner, and that possesses the power necessary and incidental to be operating the project. The proposed rule also provided that the Commissioner may approve an exception to this single asset requirement in limited circumstances based upon such criteria as specified by the Commissioner.

HUD identified one error in the proposed rule definition. Rather than stating ''incidental to operating the project,'' HUD intended to state ''incidental to owning the project,'' and this change should address several of the concerns by commenters about the definition of borrower, as discussed below.

Comment: Modify requirements for single asset entities to address identity-of-interest issues for operators. A commenter stated that the proposed rule would hamper workouts by limiting the

number of potential operators that can assume responsibility for the operations of a facility. The commenter stated that the proposed rule would cause significant time and cost burdens on the State licensing agencies that will be required to address the changes of owners and operators on HUD transactions. Commenters also stated that the requirement should be limited to new construction and acquisitions and not be applicable to refinancing transactions. Commenters stated that under the current regulatory regime, operators typically could operate a number of different facilities and own separate properties in the name of the operator. Commenters stated that requiring operators to be single asset entities means that many operators would need to either: (i) Transfer operations at the project level (including licenses and provider agreements) or (ii) transfer other assets, including licenses and interests in other facilities, all of which can be time consuming and expensive. The commenters stated that particularly where there is no identity of interest between the owner and operator, the operator may be unwilling to transfer property to comply with HUD's single asset requirements.

HUD Response: HUD recognizes the concerns raised by the commenters about single asset entities but believes that the language in the proposed rule, as modified by the correction of ''operating'' to ''owning'' in this final rule, gives adequate flexibility in this respect, and therefore HUD declines to adopt the commenters' recommendations. The proposed rule language in 24 CFR 232.3 explicitly authorizes HUD to approve ''a non-single asset entity under such circumstances, terms and conditions determined and specified as acceptable to the Commissioner.'' In addition, the proposed definition of operator provides the same flexibility for the Commissioner to specify non-single asset entities. The final rule retains this explicit authorization and flexibility. However, HUD has removed, in this final rule, the separate effective date for the implementation of this particular section. There is no overriding need for a phase-in requirement because the flexibility provided to the Commissioner to allow non-single asset entities in the rule language can be exercised where necessary.

Establishment and Maintenance of Long-Term Debt Service Reserve Accounts (§ 232.11)

The proposed rule provided that to be eligible for insurance under the Section 232 program, and except with respect to the regulatory provisions applicable to supplemental loans to finance purchase and installation of fire safety equipment (24 CFR part 232, subpart C), the borrower must establish, at final closing and maintain throughout the term of the mortgage, a long-term debt service reserve account.

Comment: Eliminate or modify the long-term debt service reserve. Commenters stated that requiring establishment of a long-term debt service reserve inappropriately restricts funds, is unnecessary for well-capitalized and well-performing properties, and is inconsistent with the practices of private lenders. Commenters stated that there are a number of problems with this proposal, which are outlined as follows.

Commenters stated that the cost of the required extra capital far exceeds the small amount of interest one earns when investing in the loan servicing account, given the cost of capital and the interest earned on the funds deposited. Several commenters stated that this would add incremental costs that would make the program noncompetitive with Fannie Mae, Freddie Mac, and the Rural Housing Service of the U.S. Department of Agriculture (USDA), commercial banks, and finance companies. A commenter further stated that this requirement defeats the purpose of the mortgage insurance premiums (MIP), which is already equivalent to an approximate 15 percent premium on the stated rate of interest. Commenters also stated that the proposal would contribute to adverse selection of FHA borrowers that would deprive FHA of the benefit of MIP payments on higher-quality lower-risk transactions.

Commenters also stated that the debt service reserve would not reduce the number or severity of mortgage insurance claims. Commenters stated that the requirement as proposed would be imposed on all properties whether or not they are well capitalized or are well performing. Commenters further stated that the debt service reserve was unnecessary, in particular, for those projects included in a master lease structure as that structure: (1) Results in all project funds being available to service the debt of a struggling project, and (2) provides a strong incentive to the operator to support the struggling project. The commenters also stated that under conventional loan standards, impositions of a debt service account are limited to under-performing loans.

Commenters further stated that maintaining a minimum balance throughout the life of the loan greatly extends the amount of time a borrower must restrict funds for this purpose.

Commenters stated that debt service reserves should not be required for § 223(a)(7) (refinancing) loans because, in refinancing, the borrower will: (1) Reduce debt service costs, increase the debt service coverage ratio, and increase funding of the reserve for replacement and/or the completion of necessary repairs, and (2) will not have mortgage proceeds available to fund the debt service reserve because they are limited by the amount of the original insured mortgage.

Commenters stated that HUD should modify § 232.11 to state that the long-term debt service reserve would be required at the discretion of HUD.

Several commenters also provided suggestions on how HUD may implement the long-term debt service reserve, if HUD chose to retain this requirement at the final rule stage. These suggestions include the following:

- The lender, not HUD, should recommend the reserve as part of the application for insurance and minimal reserves should be allowed for strong projects.
- The date of establishment of the debt service reserve should be flexible, rather than requiring the reserve to be established by the date of final closing.
- The entire reserve should be mortgageable even if the reserve results in a mortgage over the 80 percent loan-to-value (LTV) created during the conversion to Section 232 program financing. Commenters stated that this is common in the industry as cash secured lending is dollar for dollar and does not affect the collateral position. A commenter stated that HUD should allow the debt service reserve to be included as an eligible cost up to the 85 percent level.
- Flexibility should be allowed in the release of such reserves. Commenters stated that it is difficult for a borrower to agree to ''HUD's sole discretion.'' Commenters stated that rights must be given to the lender and that the lender can use its discretion on release of reserves. Also, commenters stated that there should be some benchmarks that allow the borrower to tap into the funds such as: (a) A debt service coverage ratio (DSC) that is below 1.0 for some period of time or (b) a certain threshold of capital the borrower must have contributed before the reserve can be tapped.
- Use of the Master Lease agreement should be eliminated or reduced if a longer debt service reserve is established.
- Extend the time that HUD can require a lender to advance mortgage payments from 90 days to 180 days

(multiple commenters made this comment).

- Allow borrowers, with lender approval, to consider funding the reserve with letters of credit.
- Establish the reserve in a handbook as opposed to a regulation.
- Remove the ''long-term'' qualification.

Commenters suggested that alternative strategies would have similar results. These included:

- Require debt service reserve payments under certain events such as a DSC below 1.0 or negative working capital with the reserve to be released and/or suspended upon some threshold of DSC being met.
- Require a debt service reserve payment in the event of a default of the regulatory agreement or of any pertinent loan document.
- Require the servicer to make debt service payments for some period of time before or otherwise extend the time before servicers can assign the mortgage to HUD, which the commenters stated would encourage servicers to implement early warning and workout strategies.
- Build in additional flexibility by, for example, adding language to give HUD the flexibility to allow for a reduction in the minimum balance required to be maintained in the debt service reserve and to allow for the release of funds in the debt service reserve in excess of the required amount.

HUD Response: HUD accepts the commenters' recommendations in part, and is modifying the language establishing the long-term debt service reserve in two major respects. First, the final rule modifies the proposed rule to provide HUD with the discretion as to when a long-term debt service reserve may be necessary. Second, the final rule provides for extensions of the time periods involved in the claims process, set forth in § 207.258, prior to the mortgagee's assignment of a mortgage to HUD, in order to provide HUD the same protection as was intended by the proposed long-term debt service reserve. Namely, such extensions to the claims process provide time and space for the parties involved to attempt a workout.

Because HUD does not intend to require long-term debt service reserves across the board, there is no need to address the issue of refinanced loans. HUD anticipates that the use of a long-term debt service reserve will be rare (unlike the short-term debt service escrow account that has been frequently used in the Section 232 program, and which is not a mortgageable item). HUD envisions that a long-term debt service reserve will be necessary in circumstances in which underwriting indicates an atypical long-term risk. Examples of circumstances in which HUD may require the establishment of a long-term debt service reserve include an atypically high mortgage amount, or if a key risk mitigant (such as a master lease structure typically used in a portfolio transaction) is unavailable.

HUD declines to accept some of the commenters' recommendations, such as waiting to establish the long-term debt service reserve when the need arises, as such an approach would be imposed too late to serve a useful financial purpose. HUD has also determined to retain the ''long-term'' qualification to distinguish these accounts from short-term escrow accounts. HUD also determined to retain the minimum balance requirement contained in the proposed rule to assure that reserve funds are not diverted and are used for the intended purpose.

Contract Rights and Obligations (Subpart B, Part 232)

Subpart B of the part 232 regulations addresses contract rights and obligations and the rights and duties of the mortgagee under the contract of insurance. The May 3, 2012, rule proposed several changes to the subpart B regulations.

Withdrawal of Project Funds, Including for Repayments of Advances From the Borrower, Operator, or Management Agent (§ 232.254)

The proposed rule would have added a new § 232.254 to provide that borrowers may, to the extent allowed in their transactional loan documents and applicable law, make and take distributions of mortgaged property under certain conditions. The proposed rule also included a definition of surplus cash.

Although previously, the borrower could take distributions only annually (or, in limited circumstances, semi-annually), the proposed rule would have allowed borrowers to take distributions more frequently, provided that, upon making a calculation of borrower surplus cash, no less frequently than semi-annually, such borrowers can demonstrate positive surplus cash in their semi-annual surplus cash calculation or repay any distributions made during the fiscal period if a negative surplus cash position is shown. HUD included language in the proposed rule to clarify that it does not intend to override existing transactional agreements.

Comment: Remove the 30-day repayment limitation. A commenter stated that it is unnecessary to include a specific time period in the regulations for repayment of disbursements taken during a negative surplus cash period. The commenter stated that paragraph 16(d) of the ''Healthcare Regulatory Agreement—Borrower'' (HRA–B) document includes provisions on repayment, and in the interest of promoting flexibility in the regulations, the commenter proposed a revision. The commenter suggested the following: ''30 days or within such shorter period as may be required by HUD'', be replaced with ''within such time period as may be specified by HUD.''

HUD Response: HUD adopted the concept of the commenter's recommendation. The final rule clarifies that borrowers will receive a minimum of 30 days, but HUD has the discretion to approve a longer time period, which will provide additional flexibility when a facility or project is in a workout situation.

Comment: Revise definition of ''surplus cash'' to include cash and cash equivalents and exclude amounts payable from escrows. A commenter suggested that the definition of surplus cash be revised to be consistent with paragraph 15 of the proposed HRA–B document. The commenter suggested that the definition of surplus cash in the regulations should include cash and cash equivalents (i.e., short-term investments), less the payment and segregation of amounts as thereafter set forth in 24 CFR 232.254(b).

The commenter further stated that when calculating surplus cash, accounts receivable and accounts receivable financing should either: (1) Both be included in the calculation, or (2) both be excluded from the calculation. The commenter stated that the best way to address this issue would be to exclude as a deduction any accounts receivable financing approved by HUD and to exclude accounts receivable from cash. The commenter stated that its proposed approach is the more conservative option as, due to the borrowing base requirements, the accounts receivable will be higher than accounts-receivable financing, so including it in the calculation would create more surplus cash than the method of calculation that HUD proposes. The commenter stated that its proposed approach would also be more consistent with normal and past experience, and has the additional benefit of being easier to administer because it does not require a determination of the age of accounts receivable, whether the accounts receivable are collectable or similar types of information.

A commenter suggested excluding the ''amounts payable from escrows held pursuant to the mortgage'' from the

calculation of ''all other accrued items payable by Borrower,'' to avoid double counting.

HUD Response: HUD understands the commenter's concerns, and appreciates the comments submitted regarding the calculations involved in a determination of surplus cash. Given the commenter's concerns about the components of this calculation, and the effect that changes to the definition would have on distributions, the final rule removes this definition from the regulatory text. The term surplus cash has historically been defined in the borrower regulatory agreement, and HUD will retain the definition in that document.

Leases (§ 232.256)

The proposed rule would have added a new § 232.256 to require that a borrower may not lease any portion of the project or enter into any agreement with an operator without HUD's prior written consent.

Comment: Section is overly onerous and ineffective. Several commenters stated that inclusion in the regulations of the requirement to obtain HUD approval prior to entering into leases is unnecessary, and suggested removal of this section in its entirety. Commenters stated that, historically, HUD has regulated operating and commercial leases through the terms of the Regulatory Agreement. The commenters stated that, therefore, imposing limits on leasing of the project is adequately addressed through existing mechanisms. Commenters further stated that although the multifamily regulations were recently updated, there was no analogous limitation with respect to leases in the recently adopted regulatory changes.

Commenters also stated that if HUD did not accept the suggestion to remove the requirement in its entirety, HUD should consider revisions that would add necessary flexibility to the regulation, such as giving HUD the ability to categorically permit certain types of leases across all projects through ''Program Obligations,'' a concept expressed in the discussion of HUD's recent May 2011 rule on multifamily rental projects and in the notice advising of document changes to the multifamily rental project documents. Alternatively, commenters suggested that HUD approve project-specific leases on a case by-case basis.

HUD Response: HUD accepts the commenters' recommendations and has removed this section.

Maximum Mortgage Limitations (§ 232.903)

Section 232.903 describes the maximum loan to value limits and the specific items that can be included as mortgageable items.

Comment: Include limits for public entities in § 232.903. A commenter suggested an addition to the existing regulation at § 232.903 to address public entity borrowers. Although this provision was not addressed by the proposed rule, the commenter suggested revising the existing regulatory language to add reference to public entity borrowers. The currently codified § 232.903 specifies the limits that apply to profit-motivated borrowers and private nonprofit borrowers, but does not address public entity borrowers, which are a class of borrowers contemplated in the Regulatory Agreement.

HUD Response: HUD declines to accept the commenter's recommendation. A suggested change was not proposed in the May 3, 2012, rule, and the commenter did not provide specific examples of the types of borrowers that would be covered by this term. Although HUD is not adopting the commenter's suggestion for this rule, HUD will give further consideration to the proposal.

Comment: Revise project-refinancing limitations in order to account for a change in ownership. A commenter stated that new § 232.903(c)(1)(i) (which addresses refinancing by an existing owner) prohibits a change in ownership, without specifying any time limitations as to when the change in ownership is prohibited from occurring. The commenter suggested adding the phrase ''subsequent to the date of application'' to this provision.

HUD Response: HUD accepts the commenter's recommendation and has included this language in the regulation.

Comment: Revise the cost to refinance in § 232.903(c). A commenter suggested that while HUD revised the paragraphs providing a description of existing indebtedness, those mortgageable items should more appropriately be included in the costs to refinance.

HUD Response: HUD appreciates the commenter's recommendation and agrees that these costs are appropriately listed as costs to refinance. HUD accordingly adopts the commenter's recommendation and has revised the regulation to address this issue.

Changes to § 232.903(c) and § 232.903(d) are needed to clarify proposed references to long-term debt service reserve. In this final rule, HUD revises § 232.903(c) and § 232.903(d) to improve clarity by providing a cross-reference to the long-term debt service reserve in § 232.11. HUD further clarifies that the debt service reserve contemplated by this final rule is ''long-term'' and added this qualifying term in §§ 232.903(c)(2)(vi) and 232.903(d)(6). These changes are intended to eliminate any potential confusion between this reserve and a short-term escrow. HUD is allowing the long-term debt service reserve to be a mortgageable item. The traditional short-term debt service escrow account has always been funded by the mortgagors themselves and is therefore not a mortgageable item. Examples of short-term debt escrow include the escrows on new construction/substantial rehabilitation projects, or escrows established because a project may lack a lengthy adequate financial history. Such short-term escrows have a separate escrow agreement.

Comment: Revise the cross-reference to Mortgagee Fees (§ 232.903(c)(2)(iii) and (d)(3)). A commenter stated that § 232.903(c)(3) and § 232.903(d)(3) contain cross-references to ''mortgagee fees under § 232.15''. The commenter further stated that there is no § 232.15 in the current regulations. The commenter suggested that the revised regulation could reference § 200.41, Maximum Mortgagee Fees and Charges.

HUD Response: The commenter is correct and the cross-reference to 24 CFR 200.41 has been added.

Eligible Operators and Facilities and Restrictions on Fund Distributions (New Subpart F)

Definitions (§ 232.1003 in Proposed Rule—Removed in Final Rule)

At the proposed rule stage, HUD defined the following terms in a proposed new § 232.1003: identity of interest, management agent, operator, owner operator, and project. On further consideration, HUD determined that the term ''operator'' in proposed § 232.1003 established Section 232 eligibility requirements for operators more than simply providing a definition for this term. With respect to the remaining terms, all of which are addressed in the transactional documents, HUD is removing these terms from the regulations, agreeing with commenters that the better location for these terms remains the transactional documents. Therefore, § 232.1003 at this final rule addresses eligible operators only.

Although the final rule removes the definition section for new subpart F of part 232, several comments were submitted on the proposed definitions,

and HUD responds to these comments below.

Single Asset Entity

Comment: ''Operator'' as a single asset entity is unworkable. Commenters stated that although many organizations have adopted the single asset structure, it is very common for a single legal entity to act as operator for multiple facilities. Commenters stated that segregating operations is a time-consuming process due to the need to transfer multiple licenses, establish new bank accounts, and revise numerous legal documents and agreements, and that these are particularly time consuming issues for facilities that are managed by national chains for a single asset borrower. Another commenter stated that, in some states, the single asset entity operator requirement would trigger the need for the healthcare facility to obtain a new Certificate of Need. Commenters stated that all of these changes, and the costs associated with them, make the alternative unworkable and unattractive.

Other commenters stated that the single asset entity operator be recommended but not required. Commenters also recommended that the existing organizational structure remain in place in refinancing, given that such a structure is difficult to unwind.

HUD Response: The definition of operator in the proposed rule provided flexibility for the Commissioner to approve non-single asset entities, and HUD retains that definition in the final rule.

In reviewing its portfolio of healthcare loans, HUD found that a large number of the operator entities in the Section 232 program are, in fact, single asset entities—for prudent business purposes not necessarily related to FHA-insured financing. The approach of these operator entities is also helpful to HUD's effort to assure that the operator's viability and accountability is not adversely affected by the operation of other businesses (as in the case, for example, of bankruptcy or other litigation). Nevertheless, HUD recognizes that there are operating entities in the industry that successfully operate multiple facilities without facility-specific operating entities. HUD did not intend to impede this practice where it is effective, and therefore, the proposed definition of ''operator'' also explicitly authorized HUD to approve ''a non-single asset entity under such circumstances, terms and conditions determined and specified as acceptable by the Commissioner.''

In § 232.1003 of this final rule, which now only addresses eligible operators, HUD retains this language from the proposed rule and anticipates that in situations in which licensure or other issues make utilizing a separate operating entity problematic, a non-single asset operating entity will be approved.

Operator

Comment: Specify that a master tenant is not an operator. Some commenters expressed concern that a single asset form of ownership was particularly inappropriate where Master Leases are concerned. A commenter stated that in some instances, a single project may have multiple operators. For example, a project may have a separate operator for each of the skilled nursing and assisted-living portions of a single healthcare campus. Additionally, the commenter stated that it should be specified that a master tenant is not an operator, as master tenants are not operators once they sublease the property to operators under HUD-approved subleases.

Other commenters stated that the requirement for operators to be single asset entities is a significant change. They stated that they do not object to the language as proposed, because it provides appropriate flexibility for HUD to approve non-single asset entities. The commenters requested, however, that, prior to issuing further guidance in the form of a handbook or otherwise, there should be a conversation between HUD and the healthcare industry, as there are many situations in which it may not be possible or appropriate to have a single asset operator.

HUD Response: With respect to the master lease issue, HUD clarifies in this final rule that, in a master lease context, the term ''operator'' refers to an entity that operates a facility (generally the sublessee).

With respect to establishing dialogue with industry on regulatory and transactional document changes in the Section 232 program, HUD has a good record of reaching out to industry for its input, first in the context of updating the multifamily rental project regulations and transactional documents, and now in the updating of the Section 232 program regulations and transactional documents. HUD plans to continue with such outreach.

Comment: Define arms-length or ''third-party operator'' to allow the inclusion of real estate investment trusts (REITs) and private investors. A commenter stated that the lack of a definition for an ''arm's length'' or ''third-party'' operator, together with a set of new provisions that considers the unique characteristics of this ownership group, will limit participation in the Section 232 program of one of the largest and fastest growing ownership types that include REITs and private investors. The commenter recommended that the final rule include a definition of these terms.

HUD Response: HUD declines to adopt the commenter's recommendation. HUD is interested in addressing the issues raised with regard to REITs and private investors, and received detailed comments with respect to this issue on proposed changes to the transactional documents. HUD will further consider these issues in the context of the documents.

Comment: Provide how HUD will define identity of interest. A commenter noted that HUD included a definition of ''Identity of Interest Project'' in the proposed rule, but did not include a definition of ''identity of interest'' nor does the currently codified regulations define this term. The commenter further stated that HUD defined an identity of interest in the Regulatory Agreement, but this definition was not clear because it uses the term ''ownership entity,'' which is also not a defined term, and the term ''borrower'' is used everywhere else in the agreement. The commenter requested that HUD clarify the meaning of identity of interest.

HUD Response: HUD declines to accept the recommendation. As noted earlier in this preamble, at this final rule stage, HUD is removing the proposed definition section from subpart F, agreeing with commenters to address terminology in the transactional documents.

Treatment of Project Operating Accounts (§ 232.1005)

Proposed new § 232.1005 addressed commingling of funds and directed that an operator must not, without HUD's prior approval, allow funds attributable to an FHA-insured or HUD-held healthcare facility to be commingled with funds attributable to another healthcare facility or business. This section also directed that funds generated by the operation of the healthcare facility are to be deposited into a federally insured bank account in the name of the single asset operator of the facility.

Comment: Allow HUD discretion to modify deposit-of-funds requirements. A commenter stated that for HUD to have flexibility to address situations in which accounts receivable financing or other arrangements support the deposit of funds in a manner other than into a separate, segregated account or to respond to changes in technology, the following language should be added to

the funds deposit requirement: ''except as otherwise permitted or approved by HUD.''

The commenter also suggested removing ''single asset'' where it appears in this section. The commenter stated that even if the operator is a single asset entity, funds must still be held in an account in the name of the relevant entity, and if HUD waives the single asset entity requirement for either an owner or operator, that waiver should not impact the requirement that project funds be segregated.

HUD Response: In this final rule, HUD adopts the commenter's recommendation to allow flexibility for funds to be deposited in accounts other than under the name of the operator. HUD also adopts the commenter's recommendation to remove the reference to the single asset operator in this section. There is no need to include the qualification of single asset entity given that it is addressed in § 232.1003 (eligible operator) of the final rule.

Comment: Remove reference to ''funds generated by the operation of the healthcare facility.'' A commenter suggested that HUD remove the reference to the phrase ''funds generated by the operation of the healthcare facility'' in the description of funds deposited because the phrase is overly broad.

HUD Response: HUD declines to adopt the suggestion. HUD finds the reference to funds generated by the operation of the healthcare facility to be accurate and appropriately located in the rule. In addition, the inclusion of the new language (''except as otherwise provided by HUD'') provides HUD with the authority to make any adjustments, as HUD may determine necessary. However, in this final rule, HUD removes language that could be interpreted as limiting the requirement that owner's project related funds be deposited into a federally insured bank account in only those situations where the borrower is not also the operator. Removal of that clause is intended to clarify that all of an owner's project-related funds must be deposited into a federally insured bank account in the name of the borrower.

Comment: Restriction on comingling of funds is unworkable. Commenters stated that the restriction on comingling of funds is in conflict with typical accounts receivable financing, and is not supported by the cost-benefit analysis. Commenters suggested that industry costs do not outweigh benefits. A commenter stated that the requirement that ''funds generated by the operation of the healthcare facility'' be deposited into an account in the operator's name is problematic as it has the potential to cause funds that are not attributable to the operator to be deposited in the operator's account. The commenter stated that a single project may have multiple operators. The commenter further stated that funds paid to the borrower as rent under an operating lease are arguably ''funds generated by the operation of the healthcare facility,'' but that they should not be deposited into the operator's bank account. The commenter suggested changes to correct what the commenter characterized as unintentional over-breadth of the language in the proposed rule.

Commenters suggested that HUD recognize industry best practices by requiring the lender's underwriter to review the operator's accounting system to ensure that the project has an annual audit with property level accounting. The lender would review the operator's procedures (i.e., monthly bank reconciliations) to ensure the protection and accurate tracking of cash. Commenters also urged HUD to remove the prohibition against comingling operator's funds as interfering with the implementations of the master lease program and accounts receivable financing and use concentration accounts. The commenters recommended that HUD use the control account agreements to stop funds moving into a concentration account if the project is in financial trouble.

Several lender commenters suggested that, as part of the underwriting, the lender or a consultant retained by the lender be required by HUD to perform an analysis of an operator's accounting systems to determine that the systems are sufficiently sophisticated to produce financial statements on a facility-by-facility basis.

HUD Response: As noted earlier in this preamble, in this final rule, HUD removes the requirement for segregation of operator accounts. For the reasons discussed earlier in this preamble, HUD determined that the availability today of sophisticated accounting software has the ability to protect HUD and the lender's interest without necessitating the segregation of accounting.

Comment: Proposed working capital requirements are unworkable. Several commenters stated that the requirement to maintain positive working capital in order to use funds to pay nonproject expenses without advance written HUD approval is not workable. Some commenters stated that such requirement becomes an additional surplus cash requirement.

A commenter voiced opposition to any working capital requirement, and stressed the importance of looking at an operator's portfolio in the aggregate. Another commenter asked if HUD intended to apply the working capital rules retroactively. A commentator stated that HUD should not impose this requirement at the operator level because doing so would limit the ability to efficiently manage cash at the multiprovider level.

Commenters also stated that establishment of a working capital fund would make operators and owners the targets of litigation, and that owners and operators would therefore need to limit exposure by limiting the amount of cash available to the operating entity as well as to the parent entity.

Commenters further stated that this proposed requirement was not acceptable to any operator subject to a master lease. A commenter stated that there are occasions when a facility will encounter operational issues and could end up in a negative working capital position. The commenter stated several acceptable reasons to have a negative working capital position, namely that the project: (1) Was in turnaround, (2) had decreased occupancy to allow renovations, (3) was new construction and working toward positive capital, and (4) was in compliance with state law, spending significant resources to maximize future reimbursements.

A commenter stated that if the requirement were to be put into place, the current assets, including accounts receivable, and current liabilities, such as accounts payable of the same time period, should be included in the calculation. The commenter further recommended that any current portion of long-term debt that is to be refinanced in the normal course of business be removed from the calculation because inclusion makes it punitive. Another commenter offered recommendations to HUD with respect to working capital, which included the following:

- Establish a ''carve out'' for any accruals of contingent liabilities or liabilities under appeal (such as malpractice award accruals for civil money penalties under appeal);
- Exclude from the calculation of current assets and current liabilities any payables to ownership for advances and any payables to the management company or affiliates for services rendered;
- Allow the facility to have negative working capital for at least 2 consecutive fiscal quarters before negative impacts are imposed on the borrower or operator; and
- Clarify that healthcare facility working capital relates solely to the operator.

HUD Response: HUD is removing proposed rule § 232.1005(c) and modifying proposed rule § 232.1017(b) (§ 232.1013 in this final rule). The revised provisions in the final rule tie HUD oversight of working capital, including calculation of working capital and restrictions on withdrawal, to the quarterly financial reporting system. This rule does not define working capital, but HUD will take into account the commenters' suggestions regarding the calculation of working capital when revising the Operator's Regulatory Agreement.

Comment: Reference the mortgage loan transactional documents in positive working capital. A commenter proposed that the final rule provide a reference to the mortgage loan transactional documents. The commenter stated that the rule should provide that positive working capital requirements will be governed by the proposed Healthcare Regulatory Agreement—Operator document. Another commenter raised an issue relating to perceived conflicts in the document requirements. The commenter stated that there are conflicts between this definition and the proposed Master Lease Addendum and others of the Mortgage Loan Documents, specifically, in the regulatory agreements, in which ''working capital'' would generally be defined.

Other commenters stated that the concept of maintaining positive working capital (which was originally in the proposed rule at § 232.1005(c)), was not defined, and absent a definition specifically including accounts receivable (AR) financing loan proceeds as an asset in the working capital calculation, no project with AR financing would ever be in a positive working capital situation.

HUD Response: HUD determined that it was not necessary to include a definition of working capital in the regulations because, as the commenter notes, this term is already addressed in the Section 232 transactional documents. In its review of the documents, HUD will further evaluate the use of the term ''working capital'' to determine whether there are potential conflict issues.

Operating Expenses (§ 232.1007)

The proposed rule would have required that goods and services purchased or acquired in connection with the project be reasonable and necessary for the operation or maintenance of the project, and the costs of goods and services incurred by the borrower or operator to not exceed amounts normally paid for such goods or services in the area where the services are rendered or the goods are furnished, except as otherwise approved by HUD.

Comment: The requirement to ensure that goods and services are reasonable and necessary and do not exceed prices normally paid in the area is impossible to define and monitor. Commenters stated that this provision should be removed as it is contrary to their need to make good business decisions, many of which are driven by qualitative factors not entirely related to cost, while being flexible and fluid to meeting the dynamic nature of the senior-living business. Commenters also stated that it would be impossible to monitor and define.

HUD Response: HUD declines to adopt the commenter's recommendation. HUD is modifying or removing various other more specific provisions regarding expenses that were included in the proposed rule (e.g., the definition of identity-of-interest management agents and limitations on payments to principals), on the basis that this provision is sufficient. HUD has determined that this provision essentially sets forth a reasonable business practice standard. HUD recognizes that a multitude of factors may affect the value of particular goods or services for a particular buyer, and this provision is not intended to constrain a party from considering the many aspects relevant to a purchase. HUD does not intend to micromanage individual purchase decisions. However, when and if an owner or operator's financial performance at the facility becomes problematic, HUD could legitimately act to protect its interests, including by reviewing the reasonableness of project goods and services, and by taking of any enforcement actions that may be warranted.

Comment: Provide HUD with flexibility to permit variations. A commenter suggested inclusion of the phrase ''permitted'' to allow HUD to provide additional guidance on this standard.

HUD Response: This final rule adopts the commenter's recommendation.

Payments to Borrower Principals Prohibited (§ 232.1009 in Proposed Rule—Removed in Final Rule)

The proposed rule provided that no principal of the borrower entity may receive a salary or any payment of funds derived from operation of the project, other than from permissible distributions, without HUD's prior approval.

Comment: Restrictions on payments to Principals/Affiliates are too onerous. Several commenters objected to this provision and stated that the restrictions penalize family-oriented owners/operators, affiliates of borrowers or entities with an identity of interest, and operators that provide ancillary services to their facilities through an affiliate strategy. Commenters recommended permitting principals or those with an identity of interest to receive market salaries without HUD interference. They also suggested that HUD remove the ancillary business restrictions.

Commenters also suggested alternatives such as allowing the borrower to disclose to HUD, on an annual basis, payments of project funds to principals, and in return be subject to a HUD audit. The commenters stated that, through a sampling audit process, HUD could make a test of reasonableness. Commenters also stated that HUD could develop, with industry participation, standards that must be met if a borrower pays a salary to a principal. For example, the requirement could be revised so that: (1) The borrower can pay salaries and payments to its officers and other employees who do not have a controlling interest in the borrower and to affiliates providing ancillary services; and (2) such salaries and payments will not be deemed a distribution that will be subject to repayment.

HUD Response: As noted earlier in this preamble, the final rule removes this section. Inasmuch as many owners and operators are related entities, HUD recognizes that it is not uncommon for a borrower principal to be retained by one of those entities and, as proposed, this provision would have required HUD approval in each instance in which a borrower principal works in a compensated position for the owner or operator entity. New § 232.1007 in this final rule requires that operating expenses be reasonable. In light of inclusion of this new section, HUD has determined that the proposed § 232.1009 is unnecessary.

Financial Reports (§ 232.1009 in Final Rule)

This new section, which was § 232.1011 at the proposed rule stage, clarifies and reorganizes the borrower's financial reporting requirements by placing them in part 232 of HUD's regulations. As has long been required, the borrower must submit audited financial statements, prepared and certified in accordance with the requirements of 24 CFR 5.801 and 24 CFR 200.36. The section also requires the operator to provide HUD with

complete quarterly and year-to-date financial reports based on an examination of the books and records of the operator's operations with respect to the healthcare facility.

Comment: Allow borrowers to submit income statements and balance sheets in the borrowers' format rather than audited financial statements. A commenter stated that this requirement should be limited to income statements and balance sheets, since most long-term care financial accounting software packages do not contain a statement of cash flows report. In addition, the commenter stated that these reports should follow the borrowers' format so that an additional administrative and bookkeeping burden of reformatting financial statements into HUD's format is not imposed.

HUD Response: HUD appreciates the comment, but declines to adopt the commenter's recommendations. However, HUD has determined that it is not necessary to include operational-level instructions on this particular issue at the rule level.

Leases (§ 232.1013 in Proposed Rule—Removed in Final Rule)

The proposed rule provided that, except as provided in residential agreements in the normal course of business, an operator may not lease or sublease any portion of the project without HUD's prior written approval.

Comment: Prohibition on leasing or subleasing is unnecessary; HUD already has the right to approve bed reductions. A commenter stated that the proposed policy is unnecessary since HUD already has the right to approve bed reductions. The commenter stated that since beds are the underlying purpose for HUD's involvement in guaranteeing loans for nursing homes, HUD should be concerned only with bed reductions.

Other commenters suggested that this provision should be removed, as it is handled in the transactional documents. The commenters also suggested revisions to add flexibility to the regulations.

HUD Response: As noted earlier in this preamble, the final rule removes this section. HUD agrees that the section was overly broad.

Management Agents (§ 232.1011 in Final Rule)

The proposed rule, at § 232.1015 (now § 232.1011 in this final rule), provides that an operator may, with the prior written approval of HUD, execute a management agent agreement setting forth the duties and procedures for managing matters related to the project. The proposed rule also provided that both the management agent and the management agent agreement must be acceptable to HUD and approved in writing by HUD. The proposed rule further provided that an operator may not enter into any agreement that provides for a management agent to have rights to or claims on funds owed to the operator.

Comment: HUD approval of a management agent should be limited and further defining details should be included. A commenter stated that this policy should be limited to situations where an individual state does not already regulate management agreements and impose licensure on management companies. A commenter stated that HUD could consider retaining the restriction on renegotiation of management agreements only where there is an identity of interest between the operator/owner and the management agent; otherwise, the financial interest might be blurred or there might be other interests competing against the best interest of the project operations and HUD's interest.

Several commenters stated that a management agent should be defined by its responsibilities as someone who: (1) Manages a facility that is not leased; (2) contracts in its own name with the residents; and (3) is the sole entity named on the license for the facility.

HUD Response: As noted earlier in this preamble, the final rule revises this section, accepting the commenters' recommendations in part. In many Section 232 program facilities, there is no management agent entity other than the owner or operator entity itself. However, when management authority is delegated to another entity (agent) via a management agreement, that agent's performance can greatly affect mortgage risk. For this reason, HUD finds it necessary to require HUD approval of a management agent and management agreement prior to a management agent being retained. Accordingly, paragraphs (a) and (b) are retained in § 232.1011 of the final rule. However, paragraphs (c) and (d) are being removed; those paragraphs relate to reasonableness of expenses, a topic addressed in § 232.1007. HUD has determined that further direction on creating/altering that contractual relationship can more appropriately be addressed, if necessary, as issues arise.

HUD recognizes that the scope of contractual responsibilities of management agents varies among facilities, as pointed out in the commenters' recommendations for further details on the definition of a management agent by activity. Notwithstanding this recognition, HUD does not believe it is prudent to attempt to limit the scope of the provision to the criteria suggested. The criteria stated by the commenters suggest that HUD need approve a management agent only when it is essentially functioning as a licensed operator. However, HUD believes that, even when the management agent is not a licensed entity, the scope of responsibilities undertaken have the potential to directly and significantly impact the financial and operational viability of a facility. Although HUD determined that further direction is not needed in regulation, HUD recognizes that operators use a variety of consultants and task-specific contractors. HUD does not anticipate deeming entities with such limited roles and lacking management decision-making authority as ''management agents.''

Restrictions on Deposit, Withdrawal, and Distribution of Funds, and Repayment of Advances (§ 232.1013 in Final Rule)

Section 232.1017 in the proposed rule (now § 232.1013 in the final rule) directed, in paragraph (a), that an operator must deposit in a separate segregated account in the project's name all revenue that the operator receives from operating the healthcare facility, and that the account must be with a financial institution whose deposits are insured by an agency of the Federal Government, provided that, in order to minimize risk to the insurance fund, where balances are likely to exceed federal limits on insurance of such deposits, funds must be in depository institutions acceptable to Ginnie Mae.

Paragraph (b) of proposed § 232.1017 provided that operators, whether owner-operators or non-owner-operators, must ensure that the healthcare facility maintains positive working capital at all times.

The following comments submitted in response to proposed § 232.1017, as seen below, raised issues the same or similar to those comments submitted on proposed § 232.254.

Comment: Revise definition of working capital to recognize project cash flow and make the requirement subject to HUD discretion. Commenters stated that this requirement to maintain working capital at all times is not possible since operators must pay accounts payable and pay employees more quickly than it receives payment from payor sources including Medicaid. The commenters stated that in order to properly cash-flow the business, borrowers often enter into accounts receivable-secured working capital loans.

A commenter stated that in a typical accounts-receivable financing arrangement involving more than one project, funds received by the operator may be deposited in a lockbox in the name of the AR lender, which is not a separate, segregated account. Therefore, the commenter suggested that flexibility be built into the rule to allow HUD to approve other arrangements with respect to the deposit of funds.

Other commenters stated that HUD should provide a definition of positive working capital that accounts for these timing differences.

A commenter stated that HUD should amend this requirement to state that the operator maintain working capital as HUD may prescribe. The commenter recommended that HUD more comprehensively address the issue of working capital in a handbook.

HUD Response: HUD is accepting the commenter's recommendations and modifying proposed § 232.1017(b) to read as follows: ''If a quarterly/year-to-date financial statement demonstrates negative working capital as defined by HUD, or if the operator fails to timely submit such statement, then until a current quarterly/year-to-date financial statement demonstrates positive working capital or until otherwise authorized by HUD, the operator may not distribute, advance, or otherwise use funds attributable to that facility for any purpose other than operating that facility.''

As noted in a response to earlier comments about working capital, HUD will address working capital for Section 232 projects (including modifications, if any, to the definition as understood through Generally Accepted Accounting Principles (GAAP) as issues arise.

Prompt Notification to HUD and Mortgagee of Circumstances Placing the Value of the Security at Risk (§ 232.1015 in Final Rule)

The proposed rule, at § 232.1019 (now § 232.1015 in the final rule) would have required operators, unless HUD determines otherwise, to promptly notify the owner, mortgagee, and HUD of certain matters placing the facility's viable operation, and thus the mortgage security, at substantial risk. These matters include violations of permits and approvals, imposition of civil money penalties, or governmental investigations or inquiries involving fraud. In the proposed rule, HUD determined that, given the responsibilities of servicing lenders with respect to risk mitigation of their residential care facility portfolio, it is appropriate that the lenders are timely provided with the same financial, census, and performance data (of the owner entity, as well as operator entity) that HUD is requiring borrowers and operators to routinely provide to HUD. Accordingly, the proposed rule provided that, concurrently with submitting to HUD financial data and census and performance data, the borrower and operator also provide this data to the servicing lender.

Comment: Limit scope of required notification. A commenter stated that a 48-hour requirement to forward notification of receipt of a notification is too short a time period for delivery of electronic copies of notices, reports, surveys, etc., which contain information relating to potential risks to the value of the security. The commenter noted that if, for example, notice of a permit violation was received at 4:00 p.m. on a Friday, under the proposed rules notice would need to be provided to HUD by 4:00 p.m. on Sunday. The commenter suggested that there is no need to specify a time period. Therefore, the commenter stated that revising § 232.1019(a)(1)(i) to replace ''within 48 hours after the date of receipt'' with ''within such time period as may be prescribed by HUD.'' Additionally, the commenter suggested that the phrase ''Such required information shall include'' should be replaced with ''Such required information may include'', so that if HUD determines that this provision is generating information that HUD does not want or need (for example, notice of termination of a permit that is no longer necessary), HUD can easily alter the delivery requirements based on criteria other than severity.

The commenter submitted that delivery of evidence of permit violations should be required only if the permits that are the subject of violations relate to the operation of the facility. Similarly, the commenter stated that notices of a civil money penalty being imposed should be required to be provided to HUD only if the violations that are the subject of the notices relate to the healthcare facility. Otherwise, HUD resources would be unnecessarily expended reviewing violations of permits and civil money penalties unrelated to the operation of the HUD-insured facility.

HUD Response: HUD adopts the recommendations in part. HUD is retaining the requirement that the notices listed in the rule must be provided to HUD in order to allow HUD to ascertain financial risks to the facility. The rule continues to provide that the response time will be 2 business days of receipt, which HUD continues to maintain is a generally reasonable response time, but the final rule allows HUD to approve a longer period for response.

HUD adopted the commenters' recommendation to limit the transmittal of information related to the facility, since HUD's primary interest is with regard to the facility insured. Additionally, § 232.1015 provides that HUD may determine that certain information shall be exempt from the reporting requirement based on severity level.

Comment: Make the notification requirement prospective. A commenter stated that as drafted, § 232.1019(b), now § 232.1015 in the final rule, would apply the notification requirements to all operators, including operators of existing insured projects, who would not be subject to these requirements under the terms of the mortgage loan transaction documents and regulations in effect at the time the loan closed. The commenter stated that they believed that the requirements of any new regulation should apply only to those projects that are subject to the new Section 232 loan documents, and which received a firm commitment on or after the effective date of the final regulations.

HUD Response: HUD declines to adopt the commenters' recommendation. HUD included this provision in the proposed rule in order to assure that both HUD and the lender would be notified of notices affecting both properties already in the HUD portfolio and properties insured after the effective date of the rule. Receipt of these notices will help HUD monitor failure to comply with government requirements. To the extent these notices serve as potential indicators of financial and/or management problems, they provide HUD and the lender with valuable information.

III. Costs and Benefits of Revisions to the Section 232 Program Regulations

As discussed in this preamble, this final rule updates HUD's Section 232 program regulations similar to the 2011 updates that were made to HUD's multifamily rental project regulations and accompanying closing documents. The revisions made by this rule update the Section 232 regulations to reflect existing practices in financing and refinancing healthcare facilities, and to decrease risk to the program due to outdated regulations and the need for greater accountability by healthcare facility operators. Key changes highlighted in the preamble include reducing duplicative physical inspections, extending the time period for the process of assigning the mortgage

to HUD to provide an opportunity for the parties to effectuate a workout, and requiring operators to submit quarterly and year-to-date self-certified financial reports. HUD makes two significant changes at this final rule stage. First, HUD removes the across-the-board requirement for borrowers to establish a long-term debt service reserve. The final rule provides that HUD will impose this requirement only when underwriting determines there is an atypical project risk. Second, HUD removes the requirement to segregate accounts for the purpose of isolating a particular healthcare facility's financial transactions from an account where the facility's funds have been commingled with funds of other facilities. HUD was persuaded by the comments that advised that software today is sophisticated and can provide the protections that HUD sought from proposing the manual segregation of funds.

The valued benefits from fewer physical inspections and the costs from increased financial reporting, together with the opportunity cost of the debt service reserve fund, where such fund is required, each total less than $1 million. Unvalued benefits include uninterrupted services of healthcare facilities, which otherwise would close due to foreclosure. Transfers from avoided claim payments total $13 million. The total costs, benefits, and transfers of this rule will not in any year exceed the $100 million threshold set by Executive Order 12866 (Regulatory Planning and Review). Therefore, the rule is not economically significant.

The risk mitigation requirements addressed by this rule are necessary due to the combination of two particular risks facing healthcare facilities. First, similar to multifamily residential properties, the owner usually relies on a separate entity to operate the facility. Second, unlike residential or other commercial properties, the value of a poorly maintained and operated facility can decrease dramatically because the building was designed specifically for healthcare use and, if its use for the purpose is jeopardized, it may not retain the mortgaged value at resale due to a lack of alternative uses. Thus, FHA may face more uncertainty when selling foreclosed healthcare properties than foreclosed residential properties. This final rule therefore retains requirements, proposed by the May 3, 2012, rule, that are intended to identify operator deficiencies earlier and ensure that funds are available if financial problems arise.

As noted earlier, this final rule, unlike the proposed rule, will not require all borrowers to establish a long-term debt service reserve fund. Instead, the final rule gives HUD the discretion to impose this requirement when underwriting reflects an atypical long-term project risk. The final rule retains the greater flexibility proposed to be provided to borrowers by the May 3, 2012, rule, in the making of distributions and use of surplus cash.

As did the proposed rule, the final rule requires operators to submit annual and year-to-date financial reports. Currently, the borrower, but not the operator, is required to provide audited financial statements. Although submission of the operator's financial reports is a new requirement, the expense of such reports is mitigated by allowing the operator to submit self-certified, rather than audited statements. Moreover, the required operator financial information is data that operators need to maintain in the normal course of business in order to monitor and manage their own operations effectively. FHA estimates this will require approximately 10,000 employee hours annually to prepare and submit these reports (2,500 respondents, 4 reports per year and 1 hour to generate each report). The median wage of the employees who prepare these reports is approximately $75 per hour. Thus, the total cost of complying with this requirement would be $750,000.

Finally, this rule, as proposed by the May 3, 2012, rule, exempts facilities from FHA physical inspection requirements if they are inspected by State or local agencies, so as to eliminate duplicative inspections. FHA estimates that, as a result, approximately 1,391 inspections would be avoided per year. The estimated cost per inspection totals $475, which would mean a total annual inspection savings of $660,725.

In addition to the valued benefits, this rule also provides benefits that are less easily quantified. As explained above, HUD expects the establishment of the reserve fund, where high risk triggers the need for such a fund, and financial reporting requirements to decrease the number of claims paid. While some troubled facilities may be stabilized and continue operating, at that stage of delinquency, they are often forced to close. Thus, there is a disruption of healthcare services to the community and the imposition of costs to move residents from one facility to another. In smaller communities, there are fewer alternatives for facility residents, and the benefits of avoiding foreclosure are greater as residents may be without needed services for a long period. In larger cities, existing facilities may be able to absorb the additional demand fairly quickly. In both of these cases, however, residents bear costs associated with transferring between facilities. Although the avoided loss or interruption of services is difficult to quantify and varies by city, the avoided loss or interruption of services is an important benefit that this rule is trying to achieve.

IV. Findings and Certifications

Executive Order 13563, Regulatory Review

The President's Executive Order (EO) 13563, entitled ''Improving Regulation and Regulatory Review,'' was signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This EO requires executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Section 4 of the EO, entitled ''Flexible Approaches,'' provides, in relevant part, that where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. As discussed earlier in this preamble, the regulations governing the Section 232 program facilities have not been updated since 1996. HUD submits that the changes by this rule to the Section 232 regulations are consistent with the EO's directions. As previously discussed, the changes in this rule will modernize the Section 232 program, reduce burden by eliminating duplicative physical inspections, providing flexibility to borrowers in the making of distributions and use of surplus cash, and increasing accountability to strengthen the program, thereby helping it ensure that it remains viable for the financing of healthcare facilities.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule is directed to creating transparency in HUD's Section 232 program by codifying existing and longstanding provisions imposed on a Section 232 program borrower, and

strengthening this program through stronger risk management practices, such as making operators more accountable for their role in administering Section 232 healthcare facilities. As noted under the discussion of EO 13563, this rule enhances HUD's oversight ability, while minimizing the burdens on private actors, to the benefit of participants and facility clients. Additionally, by clarifying and codifying existing requirements, the rule makes it easier for borrowers and operators to comply with their legal obligations. Through this rule, the viability of the Section 232 program and HUD's enforcement authority are increased, and waste, fraud, and abuse are reduced.

Approximately 3,343 of the anticipated annual participants in the Section 232 program are small entities, including approximately 2,500 entities involved in nursing homes, 725 entities involved in assisted-living facilities, and 70 other entities. (The total figure exceeds the number of facilities involved, because a single transaction may involve distinct legal entities serving as the operator and owner.) The changes required by this rule do not impose significant economic impacts on these small entities or otherwise adversely disproportionately burden such small entities. The reporting requirements of this rule have been tailored to complement normal business accounting practices. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, and 451 Seventh Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Information Collection Requirements

The information collection requirements contained in this rule were reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB Control Numbers 2502–0427, 2502–0593, and 2502–0551. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The docket file is available for public inspection.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the Mortgage Insurance Nursing Homes, Intermediate Care Facilities, Board and Care Homes and Assisted Living Facilities mortgage insurance programs is 14.129.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping.

24 CFR Part 207

Mortgage insurance—nursing homes, Intermediate care facilities, Board and care homes, and Assisted living facilities.

24 CFR Part 232

Fire prevention, Health facilities, Loan programs—health, Loan programs—housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

Accordingly, parts 5, 200, 207, and 232 of title 24 of the Code of Federal Regulations are amended as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), and Sec. 327, Pub. L. 109–115, 119 Stat. 2936.

■ 2. Amend § 5.801 by:
■ a. Adding paragraph (a)(6),
■ b. Revising the first sentence of the introductory text of paragraph (b),
■ c. Adding paragraph (b)(4),
■ d. Revising the paragraph (c) subject heading,
■ e. Adding paragraph (c)(4), and
■ f. Adding paragraph (d)(4) to read as follows:

§ 5.801 Uniform financial reporting standards.

(a) * * *

(6) Operators of projects with mortgages insured or held by HUD under section 232 of the Act (Mortgage Insurance for Nursing Homes, Intermediate Care Facilities, Board and Care Homes).

(b) *Submission of financial information.* Entities (or individuals) to which this subpart is applicable must provide to HUD such financial

information as required by HUD. Such information must be provided on an annual basis, except as required more frequently under paragraph (c)(4) of this section. This information must be:

* * * * *

(4) With respect to financial reports relating to properties insured under section 232 of the Act, concurrently with submitting the information to HUD, submitted to the mortgagee in a format and manner prescribed and/or approved by HUD.

(c) *Filing of financial reports.* * * *

* * * * *

(4) For entities listed in paragraph (a)(6) of this section, the financial information to be submitted to HUD in accordance with paragraph (b) of this section must be submitted to HUD on a quarterly and fiscal-year-to-date basis, within 30 calendar days of the end of each quarterly reporting period, except that the final fiscal-year-end quarter and fiscal-year-to-date reports must be submitted to HUD within 60 calendar days of the end of the fiscal-year-end quarter. HUD may direct that such forms be submitted to the lender or another third party in addition to or in lieu of submission to HUD.

(i) The financial statements submitted by entities listed in paragraph (a)(6) of this section may, at the operator's option, be operator-certified rather than audited, provided, however, if the operator is also the borrower, then that entity's obligation to submit an annual audited financial statement (in addition to its obligation as an operator to submit financial information on a quarterly and year-to-date basis) remains and is not obviated.

(ii) If HUD has reason to believe that a particular operator's operator-certified statements may be unreliable (for example, indicate a likely prohibited use of project funds), or are presented in a manner that is inconsistent with Generally Accepted Accounting Principles, HUD may, on a case-by-case basis, require audited financial statements from the operator. With respect to facilities with FHA-insured or HUD-held Section 232 mortgages, HUD may request more frequent financial statements from the borrower and/or the operator on a case-by-case basis when the circumstances warrant. Nothing in this section limits HUD's ability to obtain further or more frequent information when appropriate pursuant to the applicable regulatory agreement.

(d) * * *

(4) Entities described in paragraph (a)(6) of this section must comply with the requirements of this section with respect to fiscal years commencing on or after the date that is 60 calendar days after the date on which HUD announces, through **Federal Register** notice, that it has issued guidance on the manner in which these reports will be transmitted to HUD.

* * * * *

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 3. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715–z–21; 42 U.S.C. 3535(d).

■ 4. In 200.855, add paragraph (c)(5) to read as follows:

§ 200.855 Physical condition standards and physical inspection requirements.

* * * * *

(c) * * *

(5)(i) For assisted-living facilities, board and care facilities, and intermediate care facilities, the initial inspection required under this subpart will be conducted within the same time restrictions set forth in paragraph (c)(4) of this section, and any further inspections will be conducted at a frequency determined consistent with § 200.857, except that HUD may exempt such facilities from physical inspections under this part if HUD determines that the State or local government has a reliable and adequate inspection system in place, with the results of the inspection being readily and timely available to HUD; and

(ii) For any other Section 232 facilities, the inspection will be conducted only when and if HUD determines, on the basis of information received, such as through a complaint, site inspection, or referral by a State agency, on a case-by-case basis, that inspection of a particular facility is needed to assure protection of the residents or the adequate preservation of the project.

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

■ 5. The authority citation for part 207 continues to read as follows:

Authority: 12 U.S.C. 1701z–11(e), 1713, and 1715b; 42 U.S.C. 3535(d).

■ 6. In § 207.255: remove, in paragraph (a)(4) introductory text, the reference to ''paragraph (b)'' and add in its place a reference to ''paragraph (a)''; revise paragraph (b)(4) introductory text; and add paragraph (b)(5) to read as follows:

§ 207.255 Defaults for purposes of insurance claim.

* * * * *

(b) * * *

(4) Except for mortgages insured under section 232 of the Act, for the purposes of paragraph (b) of this section, the date of default shall be considered as:

* * * * *

(5) For mortgages insured under section 232 of the Act, for purposes of this section, the date of default shall be considered as:

(i) The first date on which the borrower has failed to pay the debt when due as a result of the lender's acceleration of the debt because of the borrower's uncorrected failure to perform a covenant or obligation under the regulatory agreement or security instrument; or

(ii) The date of the first failure to make a monthly payment that subsequent payments by the borrower are insufficient to cover when applied to the overdue monthly payments in the order in which they become due.

■ 7. Amend § 207.258 by:

■ a. Revising paragraphs (a)(1) and (a)(2) introductory text;

■ b. Adding paragraph (a)(4); and

■ c. Revise paragraph (b)(1)(i).

The revisions and addition read as follows:

§ 207.258 Insurance claim requirements.

(a) *Alternative election by mortgagee.* (1) When the mortgagee becomes eligible to receive mortgage insurance benefits pursuant to § 207.255(a)(3) or (b)(3), the mortgagee must, within 45 calendar days after the date of eligibility, such period is referred to as the ''Eligibility Notice Period'' for purposes of this section, give the Commissioner notice of its intention to file an insurance claim and of its election either to assign the mortgage to the Commissioner, as provided in paragraph (b) of this section, or to acquire and convey title to the Commissioner, as provided in paragraph (c) of this section. Notice of this election must be provided to the Commissioner in the manner prescribed in 24 CFR part 200, subpart B. HUD may extend the Eligibility Notice Period at the request of the mortgagee under the following conditions:

(i) The request must be made to and approved by HUD prior to the 45th day after the date of eligibility; and

(ii) The approval of an extension shall in no way prejudice the mortgagee's right to file its notice of its intention to file an insurance claim and of its election either to assign the mortgage to the Commissioner or to acquire and convey title to the Commissioner within the 45-day period or any extension prescribed by the Commissioner.

(2) For mortgages funded with the proceeds of state or local bonds, Ginnie Mae mortgage-backed securities, participation certificates, or other bond obligations specified by the Commissioner (such as an agreement under which the insured mortgagee has obtained the mortgage funds from third-party investors and has agreed in writing to repay such investors at a stated interest rate and in accordance with a fixed repayment schedule), any of which contains a lock-out or prepayment premium, in the event of a default during the term of the prepayment lock-out or prepayment premium, and for any mortgage insured under section 232 of the Act, the mortgagee must:

* * * * *

(4) *Acknowledgment of election.* For mortgages insured pursuant to section 232 of the Act, if the lender provides notice to the Commissioner of its election either to assign the mortgage to the Commissioner or to acquire and convey title to the Commissioner, the Commissioner shall, not later than 90 calendar days after the expiration of the Eligibility Notice Period, as defined in paragraph (a)(1) of this section, as the same may have been extended, acknowledge and accept, or reject for cause, pursuant to program requirements, the lender's election, provided that the Commissioner may, in the Commissioner's discretion, extend such 90-day period by no more than an additional 90 calendar days if the Commissioner determines that such an extension is in HUD's interest.

(b) * * *

(1) * * *

(i) If the mortgagee elects to assign the mortgage to the Commissioner, the mortgagee shall, at any time within 30 calendar days after the date HUD acknowledges the notice of election, file its application for insurance benefits and assign to the Commissioner, in such manner as the Commissioner may require, any applicable credit instrument and the realty and chattel security instruments.

* * * * *

PART 232—MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, BOARD AND CARE HOMES, AND ASSISTED LIVING FACILITIES

■ 8. The authority citation for 24 CFR part 232 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715w; 42 U.S.C. 3535(d).

■ 9. Throughout part 232, the word ''mortgagor'' is revised to read ''borrower'' wherever it appears.

■ 10. Revise § 232.1 to read as follows:

§ 232.1 Eligibility requirements, generally; applicability of certain requirements.

(a) *Eligibility, generally.* All of the requirements set forth in 24 CFR part 200, subpart A, except for the requirements for ''eligible mortgagor'' in 24 CFR 200.5, apply to mortgages insured under section 232 of the National Housing Act (12 U.S.C. 1715w), as amended.

(b) *Applicability of certain requirements.* As of October 9, 2012 the provisions in 24 CFR 207.255(b)(5), 207.258, 232.3, 232.11, 232.254, 232.903(c) and (d), and subpart F of part 232, excluding §§ 232.1007, 232.1009, and 232.1015 of subpart F are applicable only to transactions for which a firm commitment has been issued under this part on or after April 9, 2013.

§ 232.3 [Redesignated as § 232.7]

■ 11. In subpart A, redesignate § 232.3 as § 232.7 and add a new § 232.3 to read as follows:

§ 232.3 Eligible borrower.

The borrower shall be a single asset entity acceptable to the Commissioner, as may be limited by the applicable section of the Act, and shall possess the powers necessary and incidental to owning the project, except that the Commissioner may approve a non-single asset borrower entity under such circumstances, terms, and conditions determined and specified as acceptable to the Commissioner.

■ 12. Add § 232.11 to subpart A to read as follows:

§ 232.11 Establishment and maintenance of long-term debt service reserve account.

(a) To be eligible for insurance under this part, and except with respect to Supplemental Loans to Finance Purchase and Installation of Fire Safety Equipment (subpart C of this part), if HUD determines the mortgage presents an atypical long-term risk, HUD may require that the borrower establish, at final closing and maintain throughout the term of the mortgage, a long-term debt service reserve account.

(b) The long-term debt service reserve account, if required, may be financed as part of the initial mortgage amount, provided that the maximum mortgage amount as otherwise calculated is not thereby exceeded.

(c) The amount required to be initially placed in the long-term debt service reserve account and the minimum long-term balance to be maintained in that account will be determined during underwriting and separately identified in the firm commitment. Although HUD may, when appropriate to avert a mortgage insurance claim, permit the balance to fall below the required minimum long-term balance, the borrower may not take any distribution of mortgaged property except when both the long-term debt service reserve account is funded at the minimal long-term level and such distribution is otherwise permissible.

■ 13. Add § 232.254 to subpart B to read as follows:

§ 232.254 Withdrawal of project funds, including for repayments of advances from the borrower, operator, or management agent.

Borrower may make and take distributions of mortgaged property, as set forth in the mortgage loan transactional documents, to the extent and as permitted by the law of the applicable jurisdiction, provided that, upon each calculation of borrower surplus cash (as defined by HUD), which calculation shall be made no less frequently than semi-annually, borrower must demonstrate positive surplus cash, or to the extent surplus cash is negative, repay any distributions taken during such calculation period within 30 calendar days unless a longer time period is approved by HUD. Borrower shall be deemed to have taken distributions to the extent that surplus cash is negative unless, in conjunction with the calculation of surplus cash, borrower provides to HUD documentation evidencing, to HUD's reasonable satisfaction, a lesser amount of total distributions. To the extent that the provisions of this section are inconsistent with the provisions in a borrower's existing transactional loan documents, including without limitation any HUD-required regulatory agreement, the provisions of the transactional loan documents shall apply.

■ 14. In § 232.903, revise the introductory text and paragraphs (c) and (d) to read as follows:

§ 232.903 Maximum mortgage limitations.

Notwithstanding the maximum mortgage limitations set forth in 24 CFR 200.15, a mortgage within the limits set forth in this section shall be eligible for insurance under this subpart.

* * * * *

(c) *Project to be refinanced—additional limit.* (1) In addition to meeting the requirements of paragraphs (a) and (b) of this section, if the Project is to be refinanced by the insured mortgage, the maximum mortgage

amount must not exceed the cost to refinance the existing indebtedness. For the purposes of this requirement:

(i) The Project shall not have changed ownership subsequent to the date of application, or

(ii) The Project shall have been sold to a purchaser who has an identity of interest with the seller (as defined by the Commissioner).

(2) The cost to refinance the existing indebtedness will consist of the following items, the eligibility and amounts of which must be determined by the Commissioner:

(i) The amount required to pay off the existing indebtedness;

(ii) The amount of the initial deposit for the reserve fund for replacements;

(iii) Reasonable and customary legal, organization, title, and recording expenses, including mortgagee fees under § 200.41;

(iv) The estimated repair costs, if any;

(v) Architect's and engineer's fees, municipal inspection fees, and any other required professional or inspection fees; and

(vi) The amount of any long-term debt service reserve account required by the Commissioner pursuant to § 232.11.

(d) *Project to be acquired—additional limit.* In addition to meeting the requirements of paragraphs (a) and (b) of this section, if the project is to be acquired by the borrower and the purchase price is to be financed with the insured mortgage, the maximum amount must not exceed 85 percent for a profit-motivated borrower and 90 percent for a private nonprofit borrower of the cost of acquisition as determined by the Commissioner. The cost of acquisition shall consist of the following items, to the extent that each item (except for paragraph (d)(1) of this section) is paid by the purchaser separately from the purchase price. The eligibility and amounts of these items must be determined in accordance with standards established by the Commissioner.

(1) Purchase price is indicated in the purchase agreement;

(2) An amount for the initial deposit to the reserve fund for replacements;

(3) Reasonable and customary legal, organizational, title, and recording expenses, including mortgagee fees under § 200.41;

(4) The estimated repair cost, if any;

(5) Architect's and engineer's fees, municipal inspection fees, and any other required professional or inspection fees; and

(6) The amount of any long-term debt service reserve account required by the Commissioner pursuant to § 232.11.

■ 15. Add subpart F to read as follows:

Subpart F—Eligible Operators and Facilities and Restrictions on Fund Distributions

Sec.

Subpart F—Eligible Operators and Facilities and Restrictions on Fund Distributions

§ 232.1001 Scope.

This subpart establishes requirements applicable to the operators of healthcare facilities and the facilities under this part.

§ 232.1003 Eligible operator.

Operator shall be a single asset entity acceptable to the Commissioner, and shall possess the powers necessary and incidental to operating the healthcare facility, except that the Commissioner may approve a non-single asset entity under such circumstances, terms, and conditions determined and specified as acceptable to the Commissioner. A master tenant under a master lease approved by the Commissioner who has subleased the healthcare facility to an operator is not an Operator.

§ 232.1005 Treatment of project operating accounts.

All accounts deriving from the operation of the property, including operator accounts and including all funds received from any source or derived from the operation of the facility, are project assets subject to control under the insured mortgage loan's transactional documents, including, without limitation, the operator's regulatory agreement. Except as otherwise permitted or approved by HUD, funds generated by the operation of the healthcare facility shall be deposited into a federally insured bank account, provided that an account held in an institution acceptable to Ginnie Mae may have a balance that exceeds the amount to which such insurance is limited. Any of the owner's project-related funds shall be deposited into a federally insured bank account in the name of the borrower provided that an account held in an institution acceptable to Ginnie Mae may have a balance that exceeds the amount to which such insurance is limited.

§ 232.1007 Operating expenses.

Goods and services purchased or acquired in connection with the project shall be reasonable and necessary for the operation or maintenance of the project, and the costs of such goods and services incurred by the borrower or operator shall not exceed amounts normally paid for such goods or services in the area where the services are rendered or the goods are furnished, except as otherwise permitted or approved by HUD.

§ 232.1009 Financial reports.

The borrower must provide HUD and lender an audited annual financial report based on an examination of its books and records, in such form and substance required by HUD in accordance with 24 CFR 5.801 and 24 CFR 200.36. Operators must submit financial statements quarterly within 30 calendar days of the date of the end of each fiscal quarter, setting forth both quarterly and fiscal year-to-date information, except that the final fiscal year end quarter must be submitted to HUD and lender within 60 calendar days of the end of the quarter, in accordance with 24 CFR 5.801(c)(4).

§ 232.1011 Management agents.

(a) An operator or borrower may, with the prior written approval of HUD, execute a management agent agreement setting forth the duties and procedures for matters related to the management of the project. The management agent, each initial management agent agreement with that agent, and any amendments to such management agent agreements deemed material by the Commissioner must be acceptable to HUD and approved in writing by HUD.

(b) An operator or borrower may not enter into any agreement that provides for a management agent to have rights to or claims on funds owed to the operator.

§ 232.1013 Restrictions on deposit, withdrawal, and distribution of funds, and repayment of advances.

(a) *Deposit of funds.* An operator must deposit all revenue the operator receives directly or indirectly in connection with the operation of the healthcare facility in an account with a financial institution whose deposits are insured by an agency of the Federal Government, *provided* that an account held in an institution acceptable to Ginnie Mae may have a balance that exceeds the amount to which such insurance is limited.

(b) *Withdrawal of funds.* If a quarterly/year-to-date financial statement demonstrates negative

working capital as defined by HUD, or if the operator fails to timely submit such statement, then until a current quarterly/year-to-date financial statement demonstrates positive working capital or until otherwise authorized by HUD, the operator may not distribute, advance, or otherwise use funds attributable to that facility for any purpose other than operating that facility.

§ 232.1015 Prompt notification to HUD and mortgagee of circumstances placing the value of the security at risk.

(a) HUD and the mortgagee shall be informed of any notification of any failure to comply with governmental requirements including the following:

(1) The licensed operator of a project shall promptly provide HUD and the mortgagee with a copy of any notification that has placed the licensure, a provider funding source, and/or the ability to admit new residents at risk, and any responses to those notices, provided that HUD may determine certain information to be exempt from this requirement based upon severity level. With respect to the requirements of this section:

(i) The operator shall deliver to HUD and the mortgagee electronically, within 2 business days after the date of receipt, unless a longer time period is approved by HUD, copies of any and all notices, reports, surveys, and other correspondence (regardless of form) received by the operator from any governmental authority that includes any statement, finding, or assertion that:

(A) The operator or the project is or may be in violation of (or default under) any of the permits and approvals or any governmental requirements applicable to the operation of the facility;

(B) Any of the permits and approvals is to be terminated, limited in any way, or not renewed;

(C) Any civil money penalty (other than a de minimis amount) is being imposed with respect to the facility; or

(D) The operator or the project is subject to any governmental investigation or inquiry involving fraud.

(ii) The operator shall also deliver to HUD and the mortgagee, simultaneously with delivery to any governmental authority, any and all responses given by or on behalf of the operator to any of the foregoing and shall provide to HUD and the mortgagee, promptly upon request, such additional information relating to any of the foregoing as HUD or the mortgagee may request. The receipt by HUD and/or the mortgagee of notices, reports, surveys, correspondence, and other information shall not in any way impose any obligation or liability on HUD, the mortgagee, or their respective agents, representatives, or designees to take (or refrain from taking) any action; and HUD, the mortgagee, and their respective agents, representatives, and designees shall have no liability for any failure to act thereon or as a result thereof.

(2) The operator shall provide additional and ongoing information as requested by the borrower, mortgagee, or HUD pertaining to matters related to that risk. Controlling documents between or among any of the parties may provide further requirements with respect to such notification and communication.

(b) This section is applicable to all operators as of October 9, 2012.

Dated: August 31, 2012.

Carol J. Galante,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2012–21982 Filed 9–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0996]

Special Local Regulation: Hydroplane Races in Lake Sammamish, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Special Local Regulation, Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility for the 2012 Fall Championship hydroplane event in Lake Sammamish, WA from 12 p.m. until 5 p.m. each day from September 28, 2012 through September 30, 2012. This action is necessary to restrict vessel movement in the vicinity of the race courses thereby ensuring the safety of participants and spectators during these events. During the enforcement period non-participant vessels are prohibited from entering the designated race areas. Spectator craft entering, exiting or moving within the spectator area must operate at speeds which will create a minimum wake.

DATES: The regulations in 33 CFR 100.1308 will be enforced from 12 p.m. until 5 p.m. each day from September 28, 2012 through September 30, 2012.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Lieutenant Junior Grade Anthony P. LaBoy, Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206–217–6323, email *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard is providing notice of enforcement of the Special Local Regulation for Hydroplane Races within the Captain of the Port Puget Sound Area of Responsibility 33 CFR 100.1308. The Lake Sammamish area, 33 CFR 100.1308(a)(3) will be enforced from 12 p.m. until 5 p.m. from September 28, 2012 through September 30, 2012. These regulations can be found in the March 29, 2011 issue of the **Federal Register** (76 FR 17341).

Under the provisions of 33 CFR 100.1308, the regulated area shall be closed for the duration of the event to all vessel traffic not participating in the event unless authorized by the event sponsor or Coast Guard Patrol Commander.

When this special local regulation is enforced, non-participant vessels are prohibited from entering the designated race areas unless authorized by the designated on-scene Patrol Commander. Spectator craft may remain in designated spectator areas but must follow the directions of the designated on-scene Patrol Commander. The event sponsor may also function as the designated on-scene Patrol Commander. Spectator craft entering, exiting or moving within the spectator area must operate at speeds which will create a minimum wake.

Emergency Signaling: A succession of sharp, short signals by whistle or horn from vessels patrolling the areas under the discretion of the designated on-scene Patrol Commander shall serve as a signal to stop. Vessels signaled shall stop and shall comply with the orders of the patrol vessel. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

This notice is issued under authority of 33 CFR 100.1308 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners. If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: August 23, 2012.

G.G. Stump,

Captain, U.S. Coast Guard, Acting Captain of the Port, Puget Sound.

[FR Doc. 2012–22012 Filed 9–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0817]

RIN 1625–AA00

Safety Zone; Chicago Red Bull Flugtag, Lake Michigan, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Michigan near Chicago, IL. This safety zone is intended to restrict vessels from a portion of Lake Michigan for the Red Bull Flugtag event. This temporary safety zone is necessary to protect event participants, the surrounding public, and vessels from the hazards associated with this event.

DATES: This rule will be effective from 11 a.m. to 5 p.m. on September 08, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–0817. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box, and click ''Search.'' You may visit the Docket Management Facility, Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email MST1 Joseph McCollum, U.S. Coast Guard Sector Lake Michigan; telephone 414–747–7148, email *Joseph.P.Mccollum@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to the public interest. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect spectators and vessels from the hazards associated with an acrobatic event involving human-powered craft, which are discussed further below.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

Between 11:00 a.m. until 5:00 p.m. on September 8, 2012 Red Bull North America will sponsor their Red Bull Flugtag event on the waters of Lake Michigan near North Avenue Beach, Chicago, IL. The Captain of the Port, Sector Lake Michigan, has determined that the Red Bull Flugtag event, which will involve personally-crafted flying machines with human occupants falling from a raised platform into Lake Michigan, will pose a significant risk to public safety and property. Such hazards include drifting debris, collisions between spectators, falling water craft and their human occupants, and the obscuring of persons in need of rescue by spectator water craft.

C. Discussion of Rule

A temporary safety zone is necessary to ensure safety of life prior to, during, and after the Red Bull Flugtag event. With the aforementioned hazards in mind, the Captain of the Port, Sector Lake Michigan, has determined that this temporary safety zone is necessary to ensure the safety of spectators and vessels during the Red Bull Flugtag event. This zone will be effective and enforced from 11 a.m. to 5 p.m. (local) on September 8, 2012. The safety zone will encompass all waters of Lake Michigan, in the vicinity of North Avenue Beach, Chicago, IL, beginning at 41°54′37″ N, 087°37′33″ W; then north east to 41°54′53″ N, 087°37′12″ W; then south east to 41°54′49″ N, 087°37′08″; W; then south west to 41°54′34″ N, 087°37′29″ W; then back to the point of origin (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on numerous statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be relatively small and enforced for a relatively short time. Also, the safety zone is designed to minimize its impact on navigable waters. Furthermore, the safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit

through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Lake Michigan, Chicago, IL on September 8, 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This safety zone would be activated, and thus subject to enforcement, for only six hours on September 8, 2012. Traffic may be allowed to pass through the zone with the permission of the Captain of the Port. The Captain of the Port can be reached via VHF channel 16. Before the activation of the zone, we would issue local Broadcast Notice to Mariners.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T09–0817 to read as follows:

§ 165.T09–0817 Safety Zone; Chicago Red Bull Flugtag, Lake Michigan, Chicago, IL.

(a) *Location.* The safety zone will encompass all waters of Lake Michigan, in the vicinity of North Avenue Beach, Chicago IL, beginning at 41°54′37″ N, 087°37′33″ W; then north east to 41°54′53″ N, 087°37′12″ W; then south east to 41°54′49″ N, 087°37′08″ W; then south west to 41°54′34″ N, 087°37′29″ W; then back to the point of origin (NAD 83).

(b) *Effective and enforcement period.* This regulation is effective and will be enforced on September 8, 2012 from 11:00 a.m. until 5:00 p.m.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Sector Lake Michigan or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port, Sector Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Sector Lake Michigan to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Sector Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port, Sector Lake Michigan or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Sector Lake Michigan, or his on-scene representative.

Dated: August 21, 2012.

J.W. Davenport,

Commander, U.S. Coast Guard, Acting Captain of the Port, Sector Lake Michigan.

[FR Doc. 2012–22198 Filed 9–5–12; 4:15 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0574]

RIN 1625–AA00

Safety Zone, ESI Ironman 70.3 Augusta Triathlon, Savannah River; Augusta, GA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of the Savannah River in Augusta, Georgia during the ESI Ironman 70.3 Augusta Triathlon on Sunday, September 30, 2012. The event will include a 1.1 mile swim on the waters of the Savannah River. The temporary safety zone is necessary for the safety of the race participants, participant vessels, spectators, and the general public during the swim portion of the competition. Persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Savannah or a designated representative.

DATES: This rule is effective from 7 a.m. until 11:59 a.m. on September 30, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–0574. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Marine Science Technician First Class William N. Franklin, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone 912–652–4353. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On July 10, 2012, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled Safety Zone; ESI Ironman 70.3 Augusta Triathlon, Savannah River, Augusta, GA in the **Federal Register** (77 FR 40544). The Coast Guard received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. This event will occur before 30 days have elapsed after the publication of the rule in the **Federal Register**. Insufficient time was available to provide both a period for meaningful comment and also a 30 day period after publication for the effective date of this temporary final rule.

B. Basis and Purpose

(a) The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and other limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

(b) The purpose of the rule is to ensure the safety of the swimmers, participant vessels, spectators, and the general public during the ESI Ironman 70.3 Augusta Triathlon.

C. Discussion of Comments, Changes and the Final Rule

The Coast Guard did not receive any comments to the proposed rule, and no changes were made to the regulatory text.

On Sunday, September 30, 2012, the ESI Ironman 70.3 Augusta Triathlon is scheduled to take place in Augusta, Georgia. This event includes a 1.1 mile swim that will take place on the waters of the Savannah River. The swim starts at the 6th Street Railroad Bridge and finishes at Mile Post 198.

The temporary safety zone will encompass certain waters of the Savannah River in Augusta, Georgia. The temporary safety zone will be enforced from 7 a.m. until 11:59 a.m. on September 30, 2012. Persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Savannah or a designated representative.

Persons and vessels desiring to enter, transit through, anchor in, or remain

within the safety zone may contact the Captain of the Port Savannah by telephone at 912–652–4353, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the safety zone is granted by the Captain of the Port Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Savannah or a designated representative. The Coast Guard will provide notice of the safety zone by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The economic impact of this rule is not significant for the following reasons: (1) The safety zone will only be enforced for only five hours; (2) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the safety zone without authorization from the Captain of the Port Savannah or a designated representative, they may operate in the surrounding area during the enforcement period; (3) persons and vessels may still enter, transit through, anchor in, or remain within the safety zone if authorized by the Captain of the Port Savannah or a designated representative; and (4) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

(1) This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Savannah River encompassed within the safety zone from 7 a.m. until 11:59 a.m. on September 30, 2012.

(2) For the reasons discussed in the Executive Order 12866 and Executive Order 13563 section above, this rule will not have a significant economic impact on a substantial number of small entities.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the

Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary safety zone on the waters of the Savannah River that will be enforced for a total of five hours. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T07–0574 to read as follows:

§ 165.T07–0574 Safety Zone; ESI Ironman 70.3 Augusta Triathlon, Savannah River, Augusta, GA.

(a) *Regulated Area.* The following regulated area is a safety zone. All waters of the Savannah River encompassed within an imaginary line connecting the following points: Starting at Point 1 in position 33°28′44″ N, 81°57′53″ W; thence northeast to Point 2 in position 33°28′50″ N, 81°57′50″ W; thence southeast to Point 3 in position 33°27′51″ N, 81°55′36″ W; thence southwest to Point 4 in position 33°27′47″ N, 81°55′43″ W; thence northwest back to origin. All coordinates are North American Datum 1983.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Savannah in the enforcement of the regulated area.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Savannah or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Port Savannah by telephone at 912–652–4353, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Savannah or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Effective Date.* This rule is effective from 7 a.m. until 11:59 a.m. on September 30, 2012.

Dated: August 28, 2012.

J. B. Loring,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2012–22004 Filed 9–6–12; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0063]

Safety Zones; Annual Firework Displays Within the Captain of the Port, Puget Sound Area of Responsibility

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the Mukilteo Lighthouse Festival during the date and time noted below. This action is necessary to prevent injury and to protect life and property of the maritime public from the hazards associated with the firework display. During the enforcement period, entry into, transit through, mooring, or anchoring within these zones is prohibited unless authorized by the Captain of the Port, Puget Sound or his Designated Representative.

DATES: The regulations in 33 CFR 165.1332 will be enforced from 5 p.m. on September 8, 2012, through 1 a.m. on September 9, 2012.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email ENS Nathaniel P. Clinger, Sector Puget Sound Waterways Management, Coast Guard; telephone 206–217–6045; email *SectorPugetSoundWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone established for Annual Fireworks Displays within the Captain of the Port, Puget Sound Area of Responsibility in 33 CFR 165.1332 during the dates and times noted below.

The following safety zone will be enforced from 5 p.m. on September 8, 2012 through 1 a.m. on September 9, 2012:

Event name	Event location	Latitude	Longitude
Mukilteo Lighthouse Festival	Possession Sound	47° 56.9′ N	122° 18.6′ W

The special requirements listed in 33 CFR 165.1332, which can be found in the **Federal Register** (75 FR 33700) published on June 15, 2010, apply to the activation and enforcement of this zone.

All vessel operators who desire to enter the safety zone must obtain permission from the Captain of the Port or his Designated Representative by contacting either the on-scene patrol craft on VHF Ch 13 or Ch 16 or the Coast Guard Sector Puget Sound Joint Harbor Operations Center (JHOC) via telephone at (206) 217–6002.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1332 and 33 CFR part 165 and 5 U.S.C. 552(a). In addition to this notice, the Coast Guard will provide the maritime community with extensive advanced notification of the safety zone via the Local Notice to Mariners and marine information broadcasts on the day of the events.

Dated: August 23, 2012.

G.G. Stump,

Captain, U.S. Coast Guard, Acting Captain of the Port, Puget Sound.

[FR Doc. 2012–22010 Filed 9–6–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[EPA–R10–OW–2012–0197; FRL–9724–7]

Ocean Dumping; Designation of Ocean Dredged Material Disposal Sites Offshore of Yaquina Bay, Oregon

AGENCY: The Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing the designation of two new ocean dredged material disposal (ODMD) sites offshore of Yaquina Bay, Oregon, pursuant to the Marine Protection, Research, and Sanctuaries Act, as amended (MPRSA). On April 5, 2012, the EPA published a proposed rule to designate the sites and opened a public comment period under Docket ID No. EPA–R10–OW–2012–0197. The comment period closed on May 7, 2012. The EPA received several comments on the proposed rule. The EPA's responses are included in section 2.c of this final rule labeled ''Response to Comments Received.'' The EPA decided to finalize the action to designate the new sites because the new sites are needed to serve the long-term need for a location to dispose of material dredged from the Yaquina River navigation channel, and to provide a location for the disposal of dredged material for persons or entities who have received a permit for such disposal. The newly designated sites are subject to ongoing monitoring and management to ensure continued protection of the marine environment.

DATES: The effective date of this final action shall be October 9, 2012.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information may not be publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Region 10 Library, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101. The EPA Region 10 Library is open from 9:00 a.m. to noon, and 1:00 to 4:00 p.m. Monday through Friday, excluding federal holidays. The EPA Region 10 Library telephone number is (206) 553–1289.

FOR FURTHER INFORMATION CONTACT: Bridgette Lohrman, U.S. Environmental Protection Agency, Region 10, Office of Ecosystems, Tribal and Public Affairs, Environmental Review and Sediment Management Unit, Oregon Operations Office, 805 SW Broadway, Suite 500, Portland, Oregon 97205; phone number (503) 326–4006; email: *Lohrman.Bridgette@epa.gov.*

SUPPLEMENTARY INFORMATION:

1. Potentially Affected Persons

Persons potentially affected by this action include those who seek or might seek permits or approval by the EPA to dispose of dredged material into ocean waters pursuant to the Marine Protection, Research, and Sanctuaries Act, as amended (MPRSA), 33 U.S.C. 1401 to 1445. The EPA's action would be relevant to persons, including organizations and government bodies seeking to dispose of dredged material in ocean waters offshore of Yaquina Bay, Oregon. Currently, the U.S. Army Corps of Engineers (Corps) would be most affected by this action. Potentially affected categories and persons include:

Category	Examples of potentially regulated persons
Federal government	U.S. Army Corps of Engineers Civil Works projects, and other Federal agencies.
Industry and general public	Port authorities, marinas and harbors, shipyards and marine repair facilities, berth owners.
State, local and tribal governments	Governments owning and/or responsible for ports, harbors, and/or berths, Government agencies requiring disposal of dredged material associated with public works projects.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding persons likely to be affected by this action. For any questions regarding the applicability of this action to a particular person or entity, please refer to the contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

2. Background

a. History of Disposal Sites Offshore of Yaquina Bay, Oregon

The Corps historically used the general area offshore of Yaquina Bay for dredged material disposal. In 1977, an Interim ODMD site offshore of Yaquina Bay received an EPA interim designation and was used by the Corps for dredged material disposal after 1977 and prior to 1986 (Figure 1). Because of increased mounding in the Interim Site and its potential adverse effect on navigation safety, the Corps selected an alternate ODMD site, the ''Adjusted Site,'' under the authority of Section 103 of the MPRSA, with the EPA's concurrence. The Corps began to use this ''Adjusted Site'' in 1986. By 1990, dredged material had accumulated in the Adjusted Site to an extent that portions of the Site had to be avoided, and careful placement of material was necessary on specific portions of the Adjusted Site. In 2000, the Corps ceased

disposal of material at the Adjusted Site. In 2001, the Corps and the EPA completed a study examination of possible new locations for ocean disposal further offshore from the entrance to Yaquina Bay. The recommended locations from that study are the Yaquina North and South Sites designated in this action.

In October 2000, these disposal sites were authorized for use by the Corps, following the EPA's concurrence, under Section 103 of the MPRSA as selected sites. To provide for sufficient disposal capacity over the long term, on April 5, 2012, the EPA proposed to designate both a Yaquina North Site and a Yaquina South Site under Section 102 of the MPRSA, for the ocean disposal of dredged material offshore of Yaquina Bay. These proposed sites were designed to use the footprints of the Section 103 selected sites. The Yaquina North Site, which had been unavailable once authorization for use under Section 103 of the MPRSA expired at the end of the 2011 dredge season, will be available for use as a designated site upon the effective date of this final action. The Yaquina South Site, which was used for disposal of dredged material for the first time during the 2012 dredging and disposal season since its selection under Section 103 in 2001, will also be available for use as a designated site upon the effective date of this action.

The designation of the two ocean disposal sites for dredged material does not mean that the Corps or the EPA has approved the use of the Sites for open water disposal of dredged material from any specific project. Before any person or entity can dispose dredged material at either of the Sites, the EPA and the Corps must evaluate the project according to the ocean dumping regulatory criteria (40 CFR, part 227) and authorize the disposal. The EPA independently evaluates proposed dumping and has the right to restrict and/or disapprove of the actual disposal of dredged material if the EPA determines that environmental requirements under the MPRSA have not been met.

b. Location and Configuration of Yaquina North and South Ocean Dredged Material Disposal Sites

This action finalizes the designation of two ocean dredged material sites to the north and south, respectively, offshore of Yaquina Bay. The location of the two ocean dredged material disposal sites (Yaquina North and South ODMD Sites, North and South Sites, or Sites) are bounded by the coordinates, listed below, and shown in Figure 1. The designation of these two Sites will allow the EPA to adaptively manage the Sites to maximize their capacity, minimize the potential for mounding and associated safety concerns, and minimize the potential for any long-term adverse effects to the marine environment.

The coordinates for the two Sites are, in North American Datum 83 (NAD 83):

Yaquina North ODMD Site

44°38′17.98″ N, 124°07′25.95″ W
44°38′12.86″ N, 124°06′31.10″ W
44°37′14.33″ N, 124°07′37.57″ W
44°37′09.22″ N, 124°06′42.73″ W

Yaquina South ODMD Site

44°36′04.50″ N, 124°07′52.66″ W
44°35′59.39″ N, 124°06′57.84″ W
44°35′00.85″ N, 124°08′04.27″ W
44°34′55.75″ N, 124°07′09.47″ W

The two Sites are located in approximately 112 to 152 feet of water, and are located to the north and south of the entrance to Yaquina Bay on the central Oregon Coast. The Yaquina North Site is located about 1.7 nautical miles northwest of the entrance to Yaquina Bay and the Yaquina South Site is located about 2.0 nautical miles southwest of the bay's entrance. Both ocean disposal sites are 6,500 feet long by 4,000 feet wide, each about 597 acres in size.

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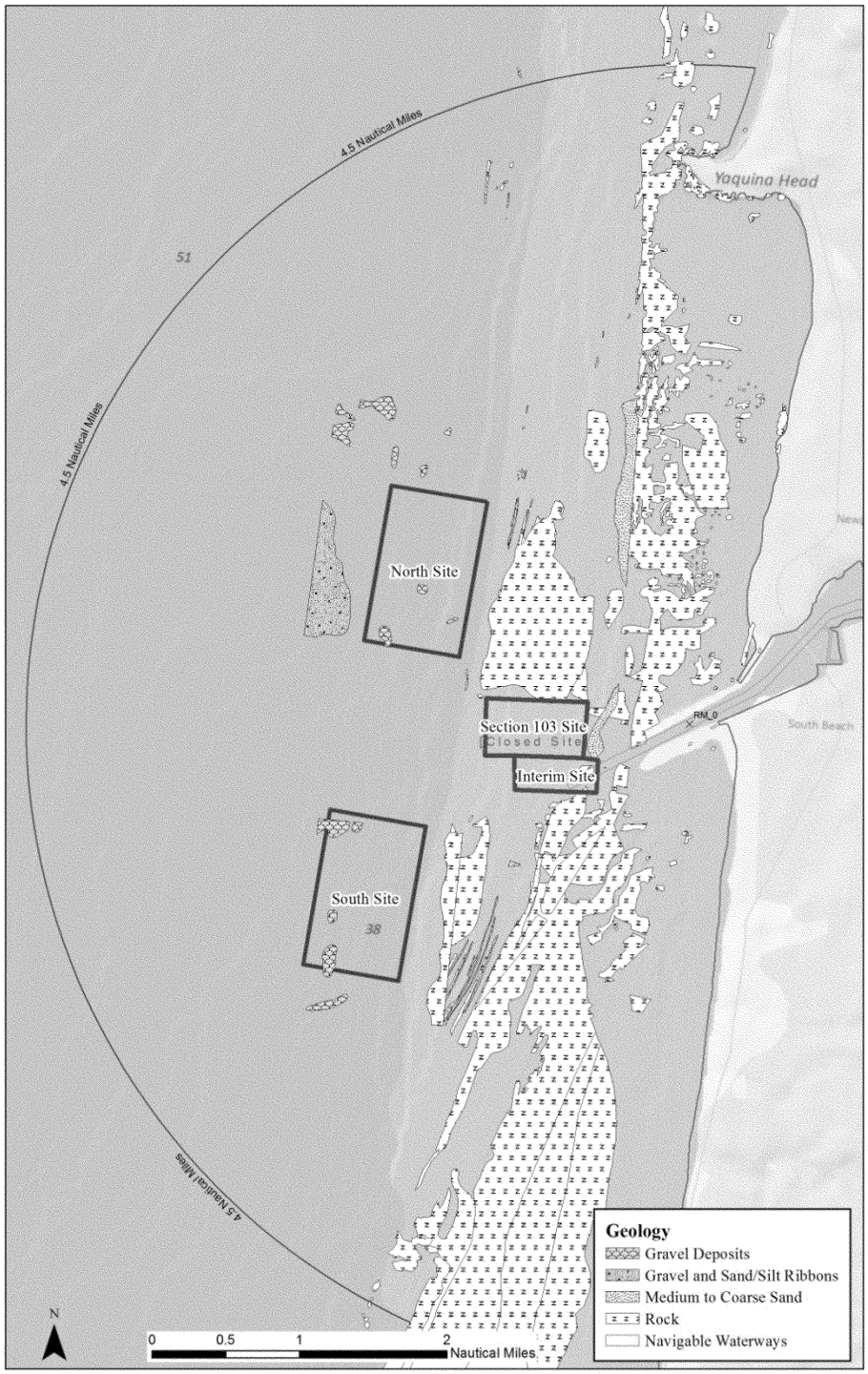

Figure 1. Yaquina North and South ODMD Sites.

The Section 103 site shown in Figure 1is also referred to as the "Adjusted Site".

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c. Response to Comments Received

The EPA received several comments on the proposed site designation during the public comment period which closed on May 7, 2012. Two commenters, while finding the proposed site designation to be thorough and inclusive, questioned whether negative effects from the site designation could be adequately controlled. In response to the concern raised by these commenters, the EPA reviewed the Site Management and Monitoring Plan (SMMP) for the Sites to ensure that controls are in place both to prevent negative effects and to correct impacts from negative effects in the unlikely event such effects occurred.

The final SMMP, found in the docket for this action, includes safeguards to act to prevent negative effects, primarily through ensuring that only material meeting ocean dumping criteria for ocean disposal are allowed to be disposed at the Sites, and through the implementation of adaptive management of the Sites. The EPA can respond to negative impacts, including, for example, having site users adjust disposal amounts, techniques, and timing, and the EPA can shut down the sites on a short term or long term basis if needed, if negative effects are observed or if trends suggest negative impacts could occur. The EPA has authority to condition, terminate or restrict site use with cause.

Another commenter suggested that dumping dredged material at the Sites would result in a large amount of pollution in concentrated areas. In response to this comment, the EPA reiterates that material allowed to be disposed of at the Sites is limited to dredged material deemed to be environmentally acceptable for ocean disposal. As discussed in the proposed designation, and further discussed below, dredged material proposed for disposal would be evaluated prior to disposal. Only dredged material without contaminant concentrations at harmful levels would be deemed suitable for ocean disposal.

This commenter also suggested that less dredging in the waterways would create less need for ocean disposal, while another commenter asked the EPA to consider alternate disposal sites and to facilitate additional discussions with local businesses and residents to discuss the impacts of the designation. The EPA appreciates these concerns. While the Corps, rather than the EPA determines the location and amount of dredging necessary to maintain the waterways of the U.S., the EPA determines, with the Corps' input, how best to dispose of material that must be disposed of in the ocean. Part of that analysis includes a balancing of community and ocean user needs. The EPA finds this site designation to be the best balance of those needs at this time. The EPA will continue to evaluate these local community concerns and will use the SMMP to make adjustments as needed to the extent practicable, to help ensure the needs of the users are balanced against the concerns of the local community.

A commenter raised a concern about the site designations on bar conditions across the Yaquina Bay bar during high swell conditions and asked whether any special analysis was warranted. The EPA and the Corps share the commenter's concern that negative effects on bar crossing safety are unacceptable. The SMMP for the designated North and South Sites is designed with safeguards to help prevent disposal at the Sites from causing or contributing to adverse swell conditions. A primary goal of site management is to avoid the creation of persistent mounds that could negatively impact the wave climate. SMMP safeguards include placement strategies and special management conditions and practices to be implemented, such as ''uniform placement'' of dredged material and annual bathymetric surveys, so as to minimize the potential for mounding that could create or contribute to adverse swell conditions across the sites. Alternating the use of the North and South Sites is an included condition to help ensure minimal impact to the wave climate. Safeguards also include quantity restrictions, and the EPA's annual review of the prior year's dumping and the EPA's review of dump plans for the upcoming year prepared by the Corps. The SMMP sets a threshold condition to require the Corps to re-evaluate disposal impacts on wave climate if bathymetric surveys show elevations at 14 feet above 2001 baseline elevations over more than 30% of the Site. If mounds above this threshold become widespread or persistent, the USACE and the EPA will conduct additional site assessment to determine if site use restrictions, including a change in disposal methodology, or cessation of use, are needed. If necessary, the EPA can direct users to conduct special studies to assess conditions and contributing factors. The EPA is convinced these safeguards combined with the EPA's authority to condition, terminate or restrict site use with cause, are sufficient to address this commenter's concern.

Finally, one commenter asked whether shorebirds in the area would be affected by the site designation. The EPA assessed the potential impact to shorebirds in the Environmental Assessment prepared for the site designation and as part of evaluating the site designation pursuant to the Endangered Species Act. As discussed in the Environmental Assessment and the Biological Assessment, shorebirds are not expected to be affected by the site designation. The U.S. Fish and Wildlife Service (USFWS) concurred with the EPA's finding that the site designation is not likely to adversely affect seabirds because of the presence of abundant suitable foraging habitat and the anticipated temporary nature of minor behavioral changes in flight or foraging during disposal activities at the designated sites. The USFWS concurrence letter is included in the docket for this action.

d. Management and Monitoring of the Sites

The Sites are expected to receive sediments dredged by the Corps to maintain the federally authorized navigation project at Yaquina Bay, Oregon and dredged material from other persons who have obtained a permit for the disposal of dredged material at the Sites. All persons using the Sites are required to follow the Site Management and Monitoring Plan (SMMP) for the Sites. The SMMP includes management and monitoring requirements to ensure that disposal activities will not unreasonably degrade or endanger human health, welfare, the marine environment, or economic potentialities. The SMMP for the Yaquina North and South Sites, in addition to the aforementioned, also addresses management of the Sites to ensure adverse mounding does not occur and to ensure that disposal events minimize interference with other uses of ocean waters in the vicinity of the proposed Sites. The SMMP, which was available for public comment as a draft document, has been finalized and the final document may be found in the Docket.

e. MPRSA Criteria

In designating these Sites, the EPA assessed the Sites according to the criteria of the MPRSA, with particular emphasis on the general and specific regulatory criteria of 40 CFR part 228, to determine whether the site designations satisfied those criteria. The EPA's *Yaquina Bay, Oregon Ocean Dredged Material Disposal Sites Evaluation Study and Environmental Assessment, July 2012* (EA), provided an extensive evaluation of the criteria and other related factors for the designation of these Sites. The EA was available as a draft document for review and comment when the EPA proposed to designate the sites. The EA has been finalized and the final document may be found in the Docket.

General Criteria (40 CFR 228.5)

(1) *Sites must be selected to minimize interference with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation (40 CFR 228.5(a)).*

The EPA reviewed the potential for the Sites to interfere with navigation,

recreation, shellfisheries, aquatic resources, commercial fisheries, protected geologic features, and cultural and/or historically significant areas and found low potential for conflicts. The Sites spatially overlap with recreational activities such as boating and whale watching, recreational and commercial finfish or Dungeness crab fishing, tow lane agreements between tow boat operators and Dungeness crab fishermen, and recreational and commercial navigation. However, the Sites are unlikely to cause interference with these or other uses provided close communication and coordination is maintained among users, vessel traffic control and the U.S. Coast Guard. Recreational users are expected to focus their activities on areas that are shoreward of the Sites, such as Yaquina Reef. Commercial fishing, including that for salmon and Dungeness crab, is expected to occur at the Sites, but the EPA does not expect disposal operations at the Sites to conflict with this use because of the limited space and time during which disposal occurs. The SMMP outlines site management objectives, including minimizing interference with other uses of the ocean. Should a site use conflict be identified, site use could be modified according to the SMMP to minimize that conflict.

(2) Sites must be situated such that temporary perturbations to water quality or other environmental conditions during initial mixing caused by disposal operations would be reduced to normal ambient levels or undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery (40 CFR 228.5(b)).

Based on the EPA's review of modeling, monitoring data, sediment quality, and history of use, no detectable contaminant concentrations or water quality effects, e.g., suspended solids, would be expected to reach any beach or shoreline from disposal activities at the Sites. The primary impact of disposal activities on water quality is expected to be temporary turbidity caused by the physical movement of sediment through the water column. All dredged material proposed for disposal will be evaluated according to the ocean dumping regulations at 40 CFR 227.13 and guidance developed by the EPA and the Corps. In general, dredged material which meets the criteria under 40 CFR 227.13(b) is deemed environmentally acceptable for ocean dumping without further testing. Dredged material which does not meet the criteria of 40 CFR 227.13(b) must be further tested as required by 40 CFR 227.13(c).

Disposal of suitable material meeting the regulatory criteria and deemed environmentally acceptable for ocean dumping will be allowed at the Sites. Most of the dredged material (approximately 95%) to be disposed at the Sites is expected to be sandy material, while a small amount of material (up to 5% of the material) would be classified as fine-grained. Hopper dredges, which are typically used for the Corps' annual navigation dredging, are not capable of removing debris from the dredge site. However, specific projects may utilize a clamshell dredge, in which case there is the potential for the occasional placement of naturally occurring debris at the disposal Sites.

(3) The sizes of disposal sites will be limited in order to localize for identification and control any immediate adverse impacts, and to permit the implementation of effective monitoring and surveillance to prevent adverse long-range impacts. Size, configuration, and location are to be determined as part of the disposal site evaluation (40 CFR 228.5(d)).

To ensure that site managers can be responsive to the specifics of each dredging season based on dredge schedules, weather, and bathymetry at the Sites, the EPA has decided to designate both the North and South Sites. The footprints of the Sites are designed to maximize their capacity, helping to assure minimal mounding and to minimize any adverse affects to the wave climate. The presence of Yaquina Reef, close to shore at shallow depths, prevents nearshore designation and dredged material disposal in dispersive locations at depths less than 60 feet. The North Site will be the preferred placement area for disposal of dredged material as was the case when the Site was used as a Section 103 selected site. During some periods, disposal may be alternated between the two Sites. The use of the South Site is more dependent upon wind and wave conditions, particularly in April and May when the typical dredge season starts, and for this reason is expected to be used less frequently than the North Site. Effective monitoring of the Sites is necessary and required. The EPA will require annual bathymetric surveys for each Site to track site capacity and to assess the potential for mounding concerns. These surveys will inform the active management of the Sites.

(4) EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites where historical disposal has occurred (40 CFR 228.5(e)).

Disposal areas located off of the continental shelf would be at least 20 nautical miles offshore. This distance is well beyond the 4.5 nautical mile haul distance determined to be feasible by the Corps for maintenance of their Yaquina Bay project. Additional disadvantages to off-shelf ocean disposal would be the unknown environmental impacts of disposal on deep-sea, stable, fine-grained benthic communities and the higher cost of monitoring sites in deeper waters and further offshore.

Historic disposal has occurred at or in the vicinity of these Sites receiving final designation. The substrate of the Sites is similar in grain size to the disposal material and the placement avoids the unique habitat features of Yaquina Reef.

Specific Criteria (40 CFR 228.6)

(1) Geographical Position, Depth of Water, Bottom Topography and Distance From Coast (40 CFR 228.6(a)(1)).

The EPA does not anticipate that the geographical position of the Sites, including the depth, bottom topography and distance from the coastline, will unreasonably degrade the marine environment. To help avoid adverse mounding at the Sites, site management will generally include uniform placement, i.e., spreading disposal material throughout the Sites in a manner that will result in a relatively uniform accumulation of disposed material on the bottom over the long-term. Site management will include creating dump plans for each Site where disposal will occur. Dump plans establish cells within the Site to ensure uniform placement. In addition to minimizing mounding, the uniform placement is expected to minimize the thickness of disposal accumulations, which is expected to be less disruptive to benthic communities and aquatic species, such as crabs, that might be present at the Sites during disposal events. Because the Sites are relatively deep, to avoid the nearshore Yaquina Reef, they are not considered dispersive. Material placed in the Sites is not expected to move from the Sites except during large storm events.

(2) Location in Relation to Breeding, Spawning, Nursery, Feeding, or Passage Areas of Living Resources in Adult or Juvenile Phases (40 CFR 228.6(a)(2)).

The Sites are not located in exclusive breeding, spawning, nursery, feeding or passage areas for adult or juvenile phases of living resources. At and in the immediate vicinity of the Sites, a variety of pelagic and demersal fish species,

including salmon, green sturgeon, and flatfish, as well as Dungeness crab, are found. Studies conducted by the EPA and the Corps at the Sites found the benthic infaunal and epifaunal community to be dominated by organisms that are adapted to a sandy environment. The benthic species, densities and diversities collected during these studies were typical of the nearshore sandy environment along the Oregon coast.

(3) Location in Relation to Beaches and Other Amenity Areas (40 CFR 228.6(a)(3)).

The Sites are approximately 2 nautical miles off the beach in water depths greater than 100 feet and beyond the ecologically and economically important Yaquina Reef. Given the depth of these Sites, the material is not expected to disperse from the Sites except during infrequent large storm events. Thus, impacts to beaches or the reef will be avoided. The sand removed from the Newport littoral cell is not expected to affect Newport's beaches because Pacific Northwest beaches tend to respond strongly to storm effects, the episodic nature of which would mask any long-term discrete changes such as disposal at these Sites. Site monitoring and adaptive management are components of the final SMMP to ensure beaches and other amenity areas are not adversely impacted.

(4) Types and Quantities of Wastes Proposed To Be Disposed of, and Proposed Methods of Release, Including Methods of Packing the Waste, if any (40 CFR 228.6(a)(4)).

Dredged material found suitable for ocean disposal pursuant to the regulatory criteria for dredged material, or characterized by chemical and biological testing and found suitable for disposal into ocean waters, will be the only material allowed to be disposed at the Sites. No material defined as ''waste'' under the MPRSA will be allowed to be disposed at the Sites. The dredged material to be disposed at the Sites will be predominantly marine sand. Generally, disposal is expected to occur from a hopper dredge, in which case, material will be released just below the surface while the disposal vessel remains under power and slowly transits the disposal location. This method of release is expected to spread material at the Sites to minimize mounding, while minimizing impacts to the benthic community and to aquatic species present at the Sites at the time of a disposal event.

(5) Feasibility of Surveillance and Monitoring (40 CFR 228.6(a)(5)).

The EPA expects monitoring and surveillance at the Sites to be feasible and readily performed from small, surface vessels. The EPA will ensure monitoring of the sites for physical, biological and chemical attributes. Bathymetric surveys will be conducted annually, contaminant levels in the dredged material will be analyzed prior to dumping, and the benthic infauna and epibenthic organisms will be monitored every 5 years, as funding allows.

(6) Dispersal, Horizontal Transport and Vertical Mixing Characteristics of the Area, Including Prevailing Current Direction and Velocity, if any (40 CFR 228.6(a)(6)).

Disposal at the Sites will not degrade the existing wave environment within or outside the Sites. The placement of dredged material may have a minor effect on circulation within or outside the site boundaries. Due to the anticipated size of the mound resulting from the accumulated dredged material (10–14 feet high covering 597 acres over 20 years), it is possible the currents in the vicinity of the Sites may begin to be affected. Any potential effect would not be expected to occur until a substantial amount of dredged material has been placed at the site (4–6 million cubic yards). At that time, the EPA plans to re-assess these assumptions and associated potential effects.

(7) Existence and Effects of Current and Previous Discharges and Dumping in the Area (Including Cumulative Effects) (40 CFR 228.6(a)(7)).

The North Site was used for disposal of dredged material from 2001 to 2011. The seafloor elevation at the Site has risen 12 feet in a few locations. Annual bathymetric surveys will continue to be conducted to monitor mounding at the North Site. To date, disposal of dredged material has not changed the benthic infaunal nor epifaunal species expected to inhabit nearshore sandy substrates at this location. The South Site, prior to this designation, was selected by the Corps under their Section 103 authority under the MPRSA and has been used during the current 2012 dredging season. Preferential use of the North Site is expected to resume when this designation becomes effective, but capacity and other factors may result in continued use of the South Site in the future. The final SMMP includes monitoring and adaptive management measures to address potential mounding issues.

(8) Interference With Shipping, Fishing, Recreation, Mineral Extraction, Desalination, Fish and Shellfish Culture, Areas of Special Scientific Importance and Other Legitimate Uses of the Ocean (40 CFR 228.6(a)(8)).

The Sites are not expected to interfere with shipping, fishing, recreation or other legitimate uses of the ocean. Commercial and recreational fishing and commercial navigation are the primary activities that may spatially overlap with disposal at the Sites. This overlap is more likely at the South Site given the South Site's proximity to the commercial shipping lane and in more direct alignment with the entrance channel to Yaquina Bay. The likelihood of direct interference with these activities is low, provided there is close communication and coordination among users, vessel traffic control and the U.S. Coast Guard. The EPA is not aware of any plans for mineral extraction, desalination plants, or fish and shellfish culture operations near the Sites at this time. The Sites are not located in areas of special scientific importance. They are located to the south of the Newport Hydrographic line, south of the proposed Northwest National Marine Renewable Energy Center's nearshore test facility, and west of the Yaquina Reef.

(9) The Existing Water Quality and Ecology of the Sites as Determined by Available Data or Trend Assessment of Baseline Surveys (40 CFR 228.6(a)(9)).

The EPA has not identified any potential adverse water quality impacts from the ocean disposal of dredged material at the Sites based on water and sediment quality analyses conducted in the study area of the Sites, and based on past disposal experience at the proposed North Site when it was used as a Section 103 selected site. Benthic grabs and trawl data show the ecology of the area to be that associated with sandy nearshore substrate typical of the Oregon Coast.

(10) Potentiality for the Development or Recruitment of Nuisance Species in the Disposal Site (40 CFR 228.6(a)(10)).

Nuisance species, considered as any undesirable organism not previously existing at a location, have not been observed at, or in the vicinity of, the Sites. Material expected to be disposed at the Sites will be uncontaminated marine sands similar to the sediment present at the Sites. Some fine-grained material, finer than natural background, may also be disposed. While this finer-grained material could have the potential to attract nuisance species to the Sites, no such recruitment is known to have taken place at the North Site while the Site was used as a Section 103 selected site. The final SMMP includes benthic infaunal and epifaunal monitoring requirements, which will act to identify any nuisance species and allow the EPA to direct special studies

and/or operational changes to address the issue if it arises.

(11) Existence at or in Close Proximity to the Site of any Significant Natural or Cultural Feature of Historical Importance (40 CFR 228.6(a)(11)).

No significant cultural features have been identified at, or in the vicinity of, the proposed Sites at this time. The EPA coordinated with Oregon's State Historic Preservation Officer and with Tribes in the vicinity of the Sites to identify any cultural features. On July 16, 2012, the State agreed with the EPA that the designation of the North and South Yaquina Sites will have no effect on any known cultural resources. No cultural features or shipwrecks have been observed or documented within the proposed Sites or their immediate vicinity.

3. Environmental Statutory Review—National Environmental Policy Act (NEPA); Magnuson-Stevens Act (MSA); Marine Mammal Protection Act (MMPA); Coastal Zone Management Act (CZMA); Endangered Species Act (ESA); National Historic Preservation Act (NHPA)

a. NEPA

Section 102 of the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 to 4370f, requires Federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the human environment. NEPA does not apply to the EPA designations of ocean disposal sites under the MPRSA because the courts have exempted the EPA's actions under the MPRSA from the procedural requirements of NEPA through the functional equivalence doctrine. The EPA has, by policy, determined that the preparation of NEPA documents for certain EPA regulatory actions, including actions under the MPRSA, is appropriate. The EPA's ''Notice of Policy and Procedures for Voluntary Preparation of NEPA Documents,'' (Voluntary NEPA Policy), 63 FR 58045, (October 29, 1998), sets out both the policy and procedures the EPA uses when preparing such environmental review documents. The EPA's primary voluntary NEPA document for designating the Sites was the draft *Yaquina Bay, Oregon Ocean Dredged Material Disposal Sites Evaluation Study and Environmental Assessment, (July 2012)* (EA), jointly prepared by the EPA and the Corps. The draft EA and its Technical Appendices, which are part of the docket for this action, were finalized after the close of the public comment period for this action. The information from the final EA is used above, in the discussion of the ocean dumping criteria.

b. MSA and MMPA

The EPA prepared an essential fish habitat (EFH) assessment pursuant to Section 305(b), 16 U.S.C. 1855(b)(2), of the Magnuson-Stevens Act, as amended (MSA), 16 U.S.C. 1801 to 1891d, and submitted that assessment to the National Marine Fisheries Service (NMFS) on December 19, 2011. The NMFS reviewed the EPA's EFH assessment and Endangered Species Act (ESA) Biological Assessment and addendum thereto for purposes of the Marine Mammal Protection Act of 1972, as amended (MMPA), 16 U.S.C. 1361 to 1389. The NMFS found that that all potential adverse effects to ESA-listed marine mammals, marine turtles, and designated critical habitat for leatherback sea turtles from the EPA's action to designate the Yaquina North and South Sites are discountable or insignificant. Those findings are documented in the Biological Opinion issued by the NMFS to the EPA on July 10, 2012. With respect to EFH, the NMFS concluded that the disposal of dredged material will adversely affect water quality from increased turbidity in the water column, availability of benthic prey species, and safe passage during disposal. The NMFS provided two EFH Conservation Recommendations to avoid or minimize the effects to EFH mentioned above. The NMFS recommends monitoring how fish interact with the disposal plume and conducting surveys to determine seasonal distribution, abundance, and habitat use of EFH species and their prey at the disposal sites. The EPA will respond in a separate written response to the NMFS' recommendations.

c. CZMA

The Coastal Zone Management Act, as amended (CZMA), 16 U.S.C. 1451 to 1465, requires Federal agencies to determine whether their actions will be consistent to the extent practicable with the enforceable policies of approved state programs. The EPA prepared a consistency determination for the Oregon Coastal Management Program (OCMP), the approved state program in Oregon, to meet the requirements of the CZMA and submitted that determination to the Oregon Department of Land Conservation and Development (DLCD) for review on February 17, 2012. The DCLD concurred on May 7, 2012, with the EPA's determination that the designation of the North and South Yaquina ODMD sites is consistent to the maximum extent practicable with the enforceable policies of the OCMP. The DLCD based its concurrence on the information contained in the EPA's consistency determination and supporting materials, and on extensive conversations with the EPA. The Oregon Department of Fish and Wildlife (ODFW) participated in discussions with the EPA and the DLCD concerning the consistency determination and both the ODFW and the DLCD encouraged the EPA to pursue future disposal sites within the littoral zone.

d. ESA

The Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 to 1544, requires Federal agencies to consult with the NMFS and the U.S. Fish and Wildlife Service (USFWS) to ensure that any action authorized, funded, or carried out by the Federal agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any critical habitat. The EPA prepared a Biological Assessment (BA) to assess the potential effects of designating the two proposed Sites on aquatic and wildlife species and submitted that BA to the NMFS and the USFWS on December 19, 2011. The EPA found that site designation does not have a direct impact on any of the identified ESA species, and also found that indirect impacts associated with reasonably foreseeable future disposal activities had to be considered. These anticipated indirect impacts from disposal included a short-term increase in suspended sediment, short-term disruption in avian foraging behavior, modification of bottom topography, loss of benthic prey species from burial, and loss of pelagic individuals during disposal of material through the water column. The EPA concluded that its action may affect, but is not likely to adversely affect 18 ESA-listed species and is not likely to adversely affect designated critical habitat for southern green sturgeon (*Acipenser medirostris)* but is likely to adversely affect Oregon Coast coho salmon (*Oncorhynchus kisutch*). The USFWS concurred on the EPA's finding that the proposed action is not likely to adversely affect listed endangered or threatened species under the jurisdiction of the USFWS.

The NMFS issued a Biological Opinion on July 10, 2012. The NMFS considered disposal by the Corps and all other entities as an interrelated action to the EPA's proposed site designation, thus, the effects from future disposals are indirect effects of the EPA's action. The NMFS concluded that the EPA's action is not likely to jeopardize the

continued existence of Oregon Coast coho salmon, southern distinct population segment (DPS) of North American green sturgeon, southern DPS of Pacific eulachon, or result in the destruction or adverse modification of designated critical habitat for southern DPS North American green sturgeon. The NMFS also concluded that the EPA's proposed action is not likely to adversely affect 18 ESA-listed salmon, sea lions, whales, marine turtles, and critical habitat for southern DPS of North American green sturgeon and leatherback turtles.

The NMFS did not issue an incidental take statement with their Biological Opinion to the EPA. This decision was based upon the following: (1) The adverse effects identified in the Biological Opinion will result from indirect effects of subsequent Federal actions carried out by the Corps and other entities carrying out dredging and disposal; (2) these individual actions are likely to cause take of ESA-listed species, so it is more appropriate to consider exempting take on a case-by-case basis as such actions are proposed in the future; (3) the EPA's action as described in the Biological Opinion does not authorize and will not itself result in disposal of any dredged materials; and (4) the NMFS does not anticipate any take will result from the site designation and adoption of the SMMP. The NMFS further stated that ''any further analysis of the effects of disposal of dredged material at the disposal site and issuance of an incidental take statement with reasonable and prudent measures and non-discretionary terms and conditions to minimize take will be prepared when an ESA consultation on a dredging and disposal action is requested.''

e. NHPA

The EPA initiated consultation with the State of Oregon's Historic Preservation Officer (SHPO) on February 27, 2012, to address the National Historic Preservation Act, as amended (NHPA), 16 U.S.C. 470 to 470a–2, which requires Federal agencies to take into account the effect of their actions on districts, sites, buildings, structures, or objects, included in, or eligible for inclusion in the National Register. The EPA determined that no historic properties were affected, or would be affected, by designation of the Sites. The EPA did not find any historic properties within the geographic area of the Sites. This determination was based on a review of the National Register of Historic Districts in Oregon, the Oregon National Register list and an assessment of potential cultural resources near the Sites. On July 16, 2012, the State agreed with the EPA that the designation of the North and South Yaquina Sites will have no effect on any known cultural resources.

4. Statutory and Executive Order Reviews

This rule finalizes the designation of two ocean dredged material disposal sites pursuant to Section 102 of the MPRSA. This action complies with applicable executive orders and statutory provisions as follows:

a. Executive Orders 12866 and 13563.

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993). This action is exempt from review under Executive Order 12866 and Executive Order 13563 (76 FR 3821, January 21, 2011).

b. Paperwork Reduction Act

The EPA does not reasonably anticipate collection of information from ten or more people based on the historic use of designated sites. Consequently, the action is not subject to the Paperwork Reduction Act.

c. Regulatory Flexibility

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 601 et seq., generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business defined by the Small Business Administration's size regulations at 13 CFR part 121; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The EPA has determined that this action will not have a significant economic impact on small entities because the rule will only have the effect of regulating the location of sites to be used for the disposal of dredged material in ocean waters. After considering the economic impacts of this proposed rule, I certify that this action will not have a significant economic impact on a substantial number of small entities.

d. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1531 to 1538, for State, local, or tribal governments or the private sector. This action imposes no new enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small government entities. Those entities are already subject to existing permitting requirements for the disposal of dredged material in ocean waters.

e. Executive Order 13132: Federalism

This action does not have federalism implications. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicited comment from State and local officials but did not receive comments from State or local officials.

f. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 because the designation of the two ocean dredged material disposal Sites will not have a direct effect on Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this action. Although Executive Order 13175 does not apply to this action the EPA consulted with tribal officials in the development of this action, particularly as the action relates to potential impacts to historic or cultural resources. The EPA specifically solicited comment from tribal officials.

The EPA did not receive comments from tribal officials.

g. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. The action concerns the designation of two ocean dredged material disposal sites and only has the effect of providing designated locations to use for ocean disposal of dredged material pursuant to Section 102(c) of the MPRSA.

h. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

i. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action includes environmental monitoring and measurement as described in the EPA's SMMP. The EPA will not require the use of specific, prescribed analytic methods for monitoring and managing the designated Sites. The Agency plans to allow the use of any method, whether it constitutes a voluntary consensus standard or not, that meets the monitoring and measurement criteria discussed in the proposed SMMP.

j. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. The EPA determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The EPA has assessed the overall protectiveness of designating the disposal Sites against the criteria established pursuant to the MPRSA to ensure that any adverse impact to the environment will be mitigated to the greatest extent practicable.

k. Congressional Review Act

Congressional Review Act (CRA), 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective October 9, 2012.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Authority: This action is issued under the authority of Section 102 of the Marine Protection, Research and Sanctuaries Act, as amended, 33 U.S.C. 1401, 1411, 1412.

Dated: August 27, 2012.

Dennis J. McLerran,

Regional Administrator, Region 10.

For the reasons set out in the preamble, the EPA amends chapter I, title 40 of the Code of Federal Register as follows:

PART 228—[AMENDED]

■ 1. The authority citation for Part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by adding paragraph (n)(15) to read as follows:

§ 228.15 Dumping sites designated on a final basis.

* * * * *

(n) * * *

(15) Yaquina Bay, OR—North and South Ocean Dredged Material Disposal Sites

(i) North Site.

(A) *Location (NAD 83):* 44°38′17.98″ N, 124°07′25.95″ W; 44°38′12.86″ N, 124°06′31.10″ W; 44°37′14.33″ N, 124°07′37.57″ W; 44°37′09.22″ N, 124°06′42.73″ W.

(B) *Size:* Approximately 1.07 nautical miles long and 0.66 nautical miles wide (0.71 square nautical miles); 597 acres (242 hectares)

(C) *Depth:* Ranges from approximately 112 to 152 feet (34 to 46 meters)

(D) *Primary Use:* Dredged material

(E) *Period of Use:* Continuing use

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13 from the Yaquina Bay and River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(ii) South Site.

(A) *Location (NAD 83):* 44°36′04.50″ N, 124°07′52.66″ W; 44°35′59.39″ N, 124°06′57.84″ W; 44°35′00.85″ N, 124°08′04.27″ W; 44°34′55.75″ N, 124°07′09.47″ W.

(B) *Size:* Approximately 1.07 nautical miles long and 0.66 nautical miles wide (0.71 square nautical miles); 597 acres (242 hectares)

(C) *Depth:* Ranges from approximately 112 to 152 feet (34 to 46 meters)

(D) *Primary Use:* Dredged material

(E) *Period of Use:* Continuing use

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal

according to 40 CFR 227.13, from the Yaquina Bay and River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

* * * * *

[FR Doc. 2012–22100 Filed 9–6–12; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Doc. No 120403252–2392–01]

RIN 0648–BC06

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correcting amendment.

SUMMARY: This action corrects groundfish regulations that were published in three final rules. The first was published on December 15, 2010, and established various provisions of the trawl rationalization program; the second published on May 11, 2011, and established the 2011–2012 harvest specifications and management measures for groundfish; the third published in December 1, 2011, and made revisions to the trawl program. This rules corrects inadvertent errors that, although they will not modify current fishing practices need to be corrected so that the rule text comports with the intent as expressed in the rules' preambles. This rule includes but is not limited to corrections to coordinates defining depth countours that apply to all fisheries, permit renewal dates, observer requirements, recreational regulations, processor obligations in the MS sector, the forms used to transfer an MS/CV endorsement, and others. Each correction is explained below.

DATES: Corrections to regulations at § 660.25(b)(4)(i)(B), 660.140(d)(3)(i)(B) and (e)(3)(i)(B) are effective September 7, 2012. The remaining corrections are effective on September 24, 2012.

FOR FURTHER INFORMATION CONTACT: Sarah Williams (Northwest Region, NMFS), phone: 206–526–4646; fax: 206–526–6736 and email: *sarah.williams@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

This action corrects regulations that were published in three separate final rules for the Pacific Coast groundfish fisheries managed under 50 CFR 660 subparts C through F in order to correctly reflect Council intent. The final rules that are the subject of this correction are as follows: (1) Trawl Rationalization Program Components final rule (program components rule) published on December 15, 2010, (75 FR 78344); (2) 2011–2012 Biennial Harvest Specifications and Management Measures final rule (2011–2012 specifications rule) published on May 11, 2011, (76 FR 28897); and (3) Trawl Program Improvement and Enhancement final rule (PIE rule) published on December 1, 2011, (76 FR 74725). As published, the three final rules contain inadvertent errors that, although they will not modify current fishing practices need to be corrected so that the rule text comports with the intent as expressed in the rules' preambles. Each correction is explained below grouped together by the final rule that originally published the regulations.

None of these changes will result in any vessel or vessel owner having to modify its behavior in order to comply with the rules. In fact, the fishery already complies with the rules as they were intended to be written. Accordingly, these corrections are just that; they make changes necessary to have the rule text reflect both NMFS' original intent—as expressed in the preambles to the rules—as well as to current fishery practice.

Corrections to Regulations Implemented as Part of the Program Components Rule

There are four corrections to the Program Components final rule, as follows:

(1) Correct regulations to specify that all commercial vessels processing groundfish at sea carry an observer. During implementation of Amendment 20 to the Pacific Coast Groundfish Fishery Management Plan (PCGFMP), which restructured the entire groundfish regulations, this existing provision, which required observers on all commercial vessel processing at-sea, was inadvertently changed from applying to all commercial fisheries to only applying to the at-sea whiting fisheries. Nonetheless, all commercial fisheries continued to use observers on board. To bring the rules in line with the original intent, this action modifies the observer requirement language to include all vessels that process groundfish at sea. The affected fisheries are as follows: Shorebased IFQ Program (§ 660.140(h)(1)(i)), the limited entry fixed gear fishery (§ 660.216(a)), and the open access fishery (§ 660.316(a)). See 68 FR 53334 (September 10, 2003) for more history on this requirement.

(2) Correct regulations at § 660.150(g)(2)(i)—the Mothership (MS) program—to clarify that processor obligations are to an MS permit and not to the MS vessel. This change is necessary to make the MS regulations consistent with the processor obligation in the MS Coop Program, as defined under ''processor obligation'' at § 660.111 and specified at § 660.150(c)(7)(i).

(3) Correct language at § 660.114(b), in the third column of the table, which specifies who is required to submit an Economic Data Collection (EDC) form. This change makes the third column of the table consistent with § 660.113(d)(1), and the table now requires owners, lessees, and charterers of a vessel registered to a C/P endorsed limited entry trawl permit to submit an EDC. Vessels subject to this rule, as revised, are already providing the EDCs; this clarification merely corrects the language of the table to make it more clear who needs to submit the EDCs.

(4) Correct language at §§ 660.150(d)(2) and 660.160(d)(2) to specify that if an applicant does not appeal an initial administrative decision (IAD) in the trawl rationalization program within 30 calendar days, that the decision in the IAD becomes the final decision. This correction will make this provision consistent with the limited entry permit regulations at § 660.25(g)(4)(ii) for IADs.

Correction to Regulations Implemented as Part of the PIE Rule

There are four corrections to the PIE rule, as follows:

(1 and 2) Correct language at §§ 660.112 and 660.140 to specify that an observer must be on the vessel while in port unless the observer provides a form to the catch monitor documenting the weight and number of select overfished species (bocaccio, canary rockfish, cowcod, and yelloweye rockfish) retained on board by the vessel during that IFQ trip. The current regulations at § 660.112 and management measures at § 660.140 are unclear on the requirements for

documenting IFQ species (all IFQ species versus the specified overfished species). Additionally corrections clarify that a vessel must carry an observer in port any time the vessel is underway in port, not just between delivery points.

(3) Correct § 660.150(g)(2)(iv)(B) to specify the proper form used to transfer an MS/CV endorsement. A request to change an MS/CV endorsement requires use of a unique form from the Fisheries Permit Office and may not be requested using the change in vessel registration and permit ownership form as currently stated in regulations.

(4) Correct regulations at § 660.150(d)(1)(v) regarding software requirements for electronic fish tickets. Current regulations erroneously state that an operating system such as ''Windows 2007'' may be used; there is no such operating system so this system is removed.

Corrections to Regulations Implemented as Part of the 2011–2012 Specifications Rule

There are two corrections to the 2011–2012 specifications rule, as follows:

(1) Correct coordinates at § 660.71(b)(25) and (c)(55), which define the 10-fm (18-m) through 40-fm (73-m) depth contour. The coordinates are expressed in degrees latitude and longitude, and define large-scale boundaries utilized in managing the groundfish fishery. These corrections change incorrect and transposed coordinate numbers listed in the final rule; and better defines the intended boundary lines. These corrections do not change the intent or application of the geographic area described in the proposed and final rules that implemented the 2011–2012 harvest specifications and management measures.

(2) Correct language at § 660.360(c)(3) to allow spearfishing for lingcod during the same seasons as all of the other modes of the California recreational fishery, consistent with the Council motion. The 2011–2012 specifications final rule revised all recreational fishing modes to match the season restrictions for the rockfish, cabezon, greenling (RCG) complex in all of the California recreational fishery management areas. However, the change to lingcod seasons for spearfishing, one mode of the California recreational fishery, was mistakenly not revised and was therefore inconsistent with the Council's recommendation and with spearfishing regulations implemented by the California Department of Fish and Game. This correction extends the lingcod season for spearfishers by exempting anglers using only spearfishing gear from lingcod season restrictions. The effects of the change to lingcod seasons and mortality of other Groundfish species, for all California recreational fishery modes including spearfishing, was analyzed in the Final Environmental Impact Statement on the 2011–2012 harvest specifications and management measures.

Correction to Permit Renewal Date

To be consistent with the FMP provisions for limited entry permit renewal, this correction revises the date by which NMFS will mail permit renewal notices from September 1st to requiring mailing by September 15th each year, and makes corresponding changes to the renewal process for Quota Share (QS) permits/accounts and vessel accounts. This change will allow NMFS' Permits Office to complete any pending transfers (changes in vessel registration or permit ownership) for the start of the September 1 cumulative limit period before sending out permit renewal notices in addition to other benefits discussed below. The following sections are revised:

(1) § 660.25(b)(4)(i)(B) for LE permits.

(2) § 660.140(d)(3)(i)(B) for QS permits/accounts.

(3) § 660.140(e)(3)(i)(B) for vessel accounts.

NMFS notes that this change still gives the affected public adequate time to renew their permits because it still allows 2 weeks advance notice of the October 1-November 30 permit renewal period.

Classification

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for additional public comment for this action because notice and comment are unnecessary and contrary to the public interest. This action simply makes corrections to accurately reflect the intent of the rules as expressed in the preamble of the final rules. In the text of those rules, however, NMFS inadvertently omitted various clauses or phrases that the preambles suggested would be included in the text. This action merely codifies NMFS' original intent for these rules. Moreover, because the parties subject to these rules already comply with the provisions as if these changes had already been made, and because the public had prior notice and opportunity to comment on the original rules—including the preambles—when they were issued, NMFS believes that allowing a second round of notice and comment on these rules may only further confuse the mistakes this rule would clarify. Moreover, these corrections are not substantive, because the regulated community has been acting in a manner consistent with the intent of the rules as expressed in their respective preambles. Implementing this rule immediately will allow the updates to come into force prior to the beginning of the next fishing year, thereby ensuring that the rules accurately reflect NMFS' original intent in implementing them.

For the same reasons, pursuant to 5 U.S.C. 553(d), the AA finds good cause to waive the 30-day delay in effective date for this action. However, NMFS will delay the effectiveness of this action for 15 days for all of the corrections listed above except the changes to the permit renewal date. Good cause exists for this waiver, because if these rules do not go into effect prior to thirty days after being printed in the **Federal Register**, then a new permit renewal cycle will start, but with contradictory information in the rule texts and the rules' preambles. This contradiction may cause public confusion, and will be inconsistent with the intent of the final rules. The 15 day delay in effective date allows NMFS to ensure the public becomes informed about the changes, even though NMFS believes that the rule will not result in any changes to fishermen's practices. Conversely, for the correction to the permit renewal date, which corrects regulations at § 660.25(b)(4)(i)(B) for LE permits, § 660.140(d)(3)(i)(B) for QS permits/accounts and § 660.140(e)(3)(i)(B) for vessel accounts, the changes become effective immediately. These corrections must be effective immediately because this correction makes current regulations consistent with the PCGFMP and affects an agency action for September. A delay would be contrary to the public's interest because it would leave in place rules that are inconsistent with the intent expressed by NMFS in the preambles of the final rules.. Therefore pursuant to 5 U.S.C. 553(d), the AA finds good cause to waive the 30-day delay in effective date.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* are inapplicable. This final rule is not significnant under Executive Order 12866.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: August 31, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 660 is amended by making the following corrections:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.15, paragraph (d)(1)(v) is revised to read as follows:

§ 660.15 Equipment requirements.

* * * * *

(d) * * *

(1) * * *

(v) Operating system: Microsoft Windows XP with Service Pack (SP) 2, Windows Server 2003 with SP1, or later operating system such as Windows Vista or Windows 7.

* * * * *

■ 3. In § 660.25, paragraph (b)(4)(i)(B) is revised to read as follows:

§ 660.25 Permits.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(B) Notification to renew limited entry permits will be issued by SFD prior to September 15 each year to the permit owner's most recent address in the SFD record. The permit owner shall provide SFD with notice of any address change within 15 days of the change.

* * * * *

■ 4. In § 660.71, paragraphs (b)(25) and (c)(55) are revised to read as follows:

§ 660.71 Latitude/longitude coordinates defining the 10-fm (18-m) through 40-fm (73-m) depth contours.

* * * * *

(b) * * *

(25) 45°46.00′ N. lat., 124°00.54′ W. long.;

* * * * *

(c) * * *

(55) 42°50.00′ N. lat., 124°37.41′ W. long;

* * * * *

■ 5. In § 660.112, paragraph (b)(1)(xiii) is revised to read as follows:

§ 660.112 Trawl fishery—prohibitions.

* * * * *

(b) * * *

(1) * * *

(xiii) Retain any IFQ species/species group onboard a vessel unless the vessel has observer coverage during the entire trip and observer or catch monitor coverage while in port until all IFQ species from the trip are offloaded. A vessel is exempted from this requirement while remaining docked in port, if the observer makes available to the catch monitor an observer program form reporting the weight and number of bocaccio, yelloweye rockfish, canary rockfish, and cowcod that were retained onboard the vessel during that trip and noting any discrepancy in those species between the vessel operator and observer. A vessel must maintain observer coverage while underway in port. A vessel may deliver IFQ species/species groups to more than one IFQ first receiver, but must maintain observer coverage onboard the vessel during any transit between delivery points. Once transfer of fish begins, all fish aboard the vessel are counted as part of the same landing as defined at § 660.11. Modifying the list of IFQ species to which this exception applies has been designated as a ''routine management measure'' and may be modified through an inseason action, as specified at § 660.60(c)(1)(iv).

* * * * *

■ 6. In § 660.114, paragraph (b) is revised to read as follows:

§ 660.114 Trawl fishery—economic data collection program.

* * * * *

(b) *Economic data collection program requirements.* The following fishery participants in the limited entry groundfish trawl fisheries are required to comply with the following EDC program requirements:

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
(1) Limited entry trawl catcher vessels.	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit at any time in 2009 or 2010.	(A) For permit owner, a limited entry trawl permit application (including MS/CV-endorsed limited entry trawl permit) will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration, vessel account actions, or if own QS permit, issuance of annual QP or IBQ pounds) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v) and § 660.140(e). (C) For a vessel lessee or charterer, participation in the groundfish fishery (including, but not limited to, issuance of annual QP or IBQ pounds if own QS or IBQ) will not be authorized, until the required EDC for their operation of that vessel is submitted.

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a catcher vessel registered to a limited entry trawl endorsed permit at any time in 2011 and beyond.	(A) For permit owner, a limited entry trawl permit application (including MS/CV-endorsed limited entry trawl permit) will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration, vessel account actions, or if own QS permit, issuance of annual QP or IBQ pounds) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v) and § 660.140(e). (C) For a vessel lessee or charterer, participation in the groundfish fishery (including, but not limited to, issuance of annual QP or IBQ pounds if own QS or IBQ) will not be authorized, until the required EDC for their operation of that vessel is submitted.
(2) Motherships	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a mothership vessel that received whiting in 2009 or 2010 as recorded in NMFS' NORPAC database.	(A) For permit owner, an MS permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v). (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a mothership vessel registered to an MS permit at any time in 2011 and beyond.	(A) For permit owner, an MS permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v). (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
(3) Catcher processors.	(i) Baseline (2009 and 2010) economic data.	All owners, lessees, and charterers of a catcher processor vessel that harvested whiting in 2009 or 2010 as recorded in NMFS' NORPAC database.	(A) For permit owner, a C/P-endorsed limited entry trawl permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v). (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.
	(ii) Annual/ongoing (2011 and beyond) economic data.	All owners, lessees, and charterers of a catcher processor vessel registered to a C/P-endorsed limited entry trawl permit at any time in 2011 and beyond.	(A) For permit owner, a C/P-endorsed limited entry trawl permit application will not be considered complete until the required EDC for that permit owner associated with that permit is submitted, as specified at § 660.25(b)(4)(i). (B) For a vessel owner, participation in the groundfish fishery (including, but not limited to, changes in vessel registration) will not be authorized until the required EDC for that owner for that vessel is submitted, as specified, in part, at § 660.25(b)(4)(v). (C) For a vessel lessee or charterer, participation in the groundfish fishery will not be authorized, until the required EDC for their operation of that vessel is submitted.

Fishery participant	Economic data collection	Who is required to submit an EDC?	Consequence for failure to submit (In addition to consequences listed below, failure to submit an EDC may be a violation of the MSA.)
(4) First receivers/ shorebased processors.	(i) Baseline (2009 and 2010) economic data.	All owners and lessees of a shorebased processor and all buyers that received groundfish or whiting harvested with a limited entry trawl permit as listed in the PacFIN database in 2009 or 2010.	A first receiver site license application for a particular physical location for processing and buying will not be considered complete until the required EDC for the applying processor or buyer is submitted, as specified at § 660.140(f)(3).
	(ii) Annual/ongoing (2011 and beyond) economic data.	(A) All owners of a first receiver site license in 2011 and beyond.	A first receiver site license application will not be considered complete until the required EDC for that license owner associated with that license is submitted, as specified at § 660.140(f)(3). See paragraph (b)(4)(ii)(A) of this table.
		(B) All owners and lessees of a shorebased processor (as defined under ''processor'' at § 660.11, for purposes of EDC) that received round or headed-and-gutted IFQ species groundfish or whiting from a first receiver in 2011 and beyond.	

* * * * *

■ 7. In § 660.140, paragraphs (d)(3)(i)(B), (e)(3)(i)(B), and (h)(1)(i) are revised to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(B) Notification to renew QS permits will be sent by SFD by September 15 each year to the QS permit owner's most recent address in the SFD record. The QS permit owner shall provide SFD with notice of any address change within 15 days of the change.

* * * * *

(e) * * *

(3) * * *

(i) * * *

(B) Notification to renew vessel accounts will be issued by SFD by September 15 each year to the vessel account owner's most recent address in the SFD record. The vessel account owner shall provide SFD with notice of any address change within 15 days of the change.

* * * * *

(h) * * *

(1) * * *

(i) *Coverage.*

(A) Any vessel participating in the Shorebased IFQ Program must carry a NMFS-certified observer during any trip and must maintain observer or catch monitor coverage while in port until all fish from that trip have been offloaded. A vessel is exempted from this requirement while remaining docked in port, if the observer makes available to the catch monitor an observer program form reporting the weight and number of those overfished species identified in § 660.112(b)(1)(xiii) that were retained onboard the vessel during that trip and noting any discrepancy in those species between the vessel operator and observer. If a vessel gets underway in port or delivers fish from an IFQ trip to more than one IFQ first receiver, an observer must remain onboard the vessel while the vessel is underway and during any transit between delivery points.

(B) Any vessel 125 ft (38.1 m) LOA or longer that is engaged in at-sea processing must carry two NMFS-certified observers, and any vessel shorter than 125 ft (38.1 m) LOA that is engaged in at-sea processing must carry one NMFS-certified observer, each day that the vessel is used to take, retain, receive, land, process, or transport groundfish.

* * * * *

■ 8. In § 660.150, paragraphs (d)(2), (g)(2)(i) introductory text and (g)(2)(iv)(B) are revised to read as follows:

§ 660.150 Mothership (MS) Coop Program.

* * * * *

(d) * * *

(2) *Initial administrative determination.* For all complete applications, NMFS will issue an IAD that either approves or disapproves the application. If approved, the IAD will include a MS coop permit. If disapproved, the IAD will provide the reasons for this determination. The IAD for a MS coop permit follows the same requirement as specified for limited entry permits at § 660.25(g)(4)(ii); if the applicant does not appeal the IAD within the 30 calendar days, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

* * * * *

(g) * * *

(2) * * *

(i) *Renewal.* An MS/CV-endorsed permit must be renewed annually consistent with the limited entry permit regulations given at § 660.25(b)(4). During renewal, all MS/CV-endorsed limited entry permit owners must make a preliminary declaration regarding their intent to participate in the coop or non-coop portion of the MS Coop Program for the following year. If the owner of a MS/CV-endorsed permit intends to participate in the coop portion of the MS Coop Program, they must also declare to which MS permit they intend to obligate the permit's catch history assignment. MS/CV-endorsed permits not obligated to a permitted MS coop by March 31 of the fishing year will be assigned to the non-coop fishery. For an MS/CV-endorsed permit that is not renewed, the following occurs:

* * * * *

(iv) * * *

(B) *Application.* A request for a change in MS/CV endorsement registration must be made between September 1 and December 31 of each year. Any transfer of MS/CV endorsement and its associated CHA to another limited entry trawl permit must be requested using the appropriate form from the Fisheries Permits Office and the permit owner or an authorized representative of the permit owner must certify that the application is true and correct by signing and dating the form. In addition, the form must be notarized, and the permit owner selling the MS/CV endorsement and CHA must provide to NFMS the sale price of the MS/CV endorsement and its associated CHA. If any assets in addition to the MS/CV endorsement and its associated CHA are

included in the sale price, those assets must be itemized and described.

* * * * *

■ 9. In § 660.160, paragraph (d)(2) is revised to read as follows:

§ 660.160 Catcher/processor (C/P) Coop Program.

* * * * *

(d) * * *

(2) *Initial administrative determination.* For all complete applications, NMFS will issue an IAD that either approves or disapproves the application. If approved, the IAD will include a C/P coop permit. If disapproved, the IAD will provide the reasons for this determination. The IAD for a C/P coop permit follows the same requirement as specified for limited entry permits at § 660.25(g)(4)(ii), if the applicant does not appeal the IAD within the 30 calendar days, the IAD becomes the final decision of the Regional Administrator acting on behalf of the Secretary of Commerce.

* * * * *

■ 10. In § 660.216, paragraph (a) is revised to read as follows:

§ 660.216 Fixed gear fishery—observer requirements.

(a) *Observer coverage requirements.* (1) When NMFS notifies the owner, operator, permit holder, or the manager of a catcher vessel, specified at § 660.16(c), of any requirement to carry an observer, the catcher vessel may not be used to fish for groundfish without carrying an observer.

(2) Any vessel 125 ft (38.1 m) LOA or longer that is engaged in at-sea processing must carry two NMFS-certified observers, and any vessel shorter than 125 ft (38.1 m) LOA that is engaged in at-sea processing must carry one NMFS-certified observer, each day that the vessel is used to take, retain, receive, land, process, or transport groundfish.

* * * * *

■ 11. In § 660.316, paragraph (a) is revised to read as follows:

§ 660.316 Open access fishery—observer requirements.

(a) *Observer coverage requirements.* (1) When NMFS notifies the owner, operator, permit holder, or the manager of a catcher vessel, specified at § 660.16(c), of any requirement to carry an observer, the catcher vessel may not be used to fish for groundfish without carrying an observer.

(2) Any vessel 125 ft (38.1 m) LOA or longer that is engaged in at-sea processing must carry two NMFS-certified observers, and any vessel shorter than 125 ft (38.1 m) LOA that is engaged in at-sea processing must carry one NMFS-certified observer, each day that the vessel is used to take, retain, receive, land, process, or transport groundfish.

* * * * *

■ 12. In § 660.360, paragraph (c)(3) introductory text is revised to read as follows:

§ 660.360 Recreational fishery-management measures.

* * * * *

(c) * * *

(3) *California.* Seaward of California, California law provides that, in times and areas when the recreational fishery is open, there is a 20-fish bag limit for all species of finfish, within which no more than 10 fish of any one species may be taken or possessed by any one person. [Note: There are some exceptions to this rule. The following groundfish species are not subject to a bag limit: Petrale sole, Pacific sanddab and starry flounder.] For groundfish species not specifically mentioned in this paragraph, fishers are subject to the overall 20-fish bag limit for all species of finfish and the depth restrictions at paragraph (c)(3)(i) of this section. Recreational spearfishing for all federally-managed groundfish is exempt from closed areas and seasons, consistent with Title 14 of the California Code of Regulations. This exemption applies only to recreational vessels and divers provided no other fishing gear, except spearfishing gear, is on board the vessel. California state law may provide regulations similar to Federal regulations for the following state-managed species: Ocean whitefish, California sheephead, and all greenlings of the genus Hexagrammos. Kelp greenling is the only federally-managed greenling. Retention of cowcod, yelloweye rockfish, and canary rockfish is prohibited in the recreational fishery seaward of California all year in all areas. For each person engaged in recreational fishing in the EEZ seaward of California, the following closed areas, seasons, bag limits, and size limits apply:

* * * * *

[FR Doc. 2012–21990 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 174
Friday, September 7, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1042; Directorate Identifier 2010–NM–094–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for certain The Boeing Company Model 737–700, –700C, –800, and –900ER series airplanes, Model 747–400F series airplanes, and Model 767–200 and –300 series airplanes. That NPRM proposed to require an inspection for affected serial numbers of the crew oxygen mask stowage box units; and replacement of the crew oxygen mask stowage box unit with a new crew oxygen mask stowage unit, if necessary. That NPRM was prompted by reports indicating that certain crew oxygen mask stowage box units were possibly delivered with a burr in the inlet fitting. The burr might break loose during test or operation, and might pose an ignition source or cause an inlet valve to jam. This action revises that NPRM by adding a step to identify and label certain crew oxygen mask stowage box units that have already been inspected and reworked by the supplier, and allowing operators to install new or serviceable crew oxygen mask stowage box units. We are proposing this supplemental NPRM to prevent an ignition source, which could result in an oxygen-fed fire; or an inlet valve jam in a crew oxygen mask stowage box unit, which could result in restricted flow of oxygen. Since these actions impose an additional burden over that proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this supplemental NPRM by October 22, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For Boeing service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* For Intertechnique service information identified in this proposed AD, contact Zodiac, 2, rue Maurice Mallet—92137 Issy-les-Moulineaux Cedex France; telephone +33 1 41 23 23 23; fax +33 1 46 48 83 87; Internet *http://www.zodiac.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Susan L. Monroe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6457; fax: 425–917–6590; email *susan.l.monroe@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2010–1042; Directorate Identifier 2010–NM–094–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an AD that would apply to certain The Boeing Company Model 737–700, –700C, –800, and –900ER series airplanes, Model 747–400F series airplanes, and Model 767–200 and –300 series airplanes. That NPRM published in the **Federal Register** on November 3, 2010 (75 FR 67637). That NPRM proposed to require an inspection for affected serial numbers of the crew oxygen mask stowage box units; and replacement of the crew oxygen mask stowage box unit with a new crew oxygen mask stowage unit, if necessary.

Actions Since Previous NPRM (75 FR 67637, November 3, 2010) was Issued

The NPRM (75 FR 67637, November 3, 2010) referred to the following service information:

- Boeing Alert Service Bulletin 737–35A1121, dated December 14, 2009;

- Boeing Alert Service Bulletin 747–35A2126, dated October 8, 2009;
- Boeing Alert Service Bulletin 767–35A0057, dated October 8, 2009; and
- Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009.

After we issued the NPRM, the service information was revised:

- Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011;
- Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011;
- Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011; and
- Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011.

Among other things, the service information provides the following changes:

- Adds a step to identify and label certain crew oxygen mask stowage box units that have already been inspected and reworked by the supplier; and
- Adds a provision to allow operators to install either new or serviceable crew oxygen mask stowage box units.

Comments

We gave the public the opportunity to comment on the previous NPRM (75 FR 67637, November 3, 2010). The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for the Previous NPRM (75 FR 67637, November 3, 2010)

Boeing, Air Line Pilots Association, International (ALPA), and Delta Air Lines (Delta) supported the NPRM (75 FR 67637, November 3, 2010).

Request To Revise Compliance Time

ALPA requested that we reduce the compliance time to 12 months instead of 24 months, as proposed in the previous NPRM (75 FR 67637, November 3, 2010). ALPA noted that certain crew oxygen mask stowage box units were possibly delivered with a burr in the inlet fitting, which might break loose during test or operation, and might pose an ignition source or cause an inlet valve to jam, thus prohibiting or restricting the flow of oxygen. ALPA reasoned that there could be a potential serious nature of events involving fire and smoke, and that there is a necessity to ensure functionality of this safety equipment for the flightcrew.

We disagree with the request to revise the compliance time in the supplemental NPRM. The proposed compliance time is in line with the manufacturer's recommended compliance time. Also, in developing the proposed compliance time, we considered safety implications, parts availability, and normal maintenance schedules for timely accomplishment of replacement of the crew oxygen mask stowage box units. Further, operators are permitted to accomplish the requirements of an AD at a time earlier than the specified compliance time. If additional data are presented that would justify a shorter compliance time, we might consider further rulemaking on this issue. We have not changed the supplemental NPRM in this regard.

Request for Clarification of Inspection

Japan Airlines (JAL) requested that we revise the previous NPRM (75 FR 67637, November 3, 2010) to include the latest service information. JAL explained that Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009, does not describe how to differentiate parts before and after the actions specified in Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009, have been accomplished, so it is not sufficient for operators to complete Intertechnique Service Bulletin MXP1/4–35175, dated September 11, 2009.

Continental Airlines (Continental) requested that we revise the previous NPRM (75 FR 67637, November 3, 2010) to clarify which crew oxygen mask stowage box units have been inspected, and which crew oxygen mask stowage box units still need to be inspected. Continental explained that some operators might think a placard should be applied to all crew oxygen mask stowage box units after completion of Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009, not only to those crew oxygen mask stowage box units with suspect serial numbers itemized in table 1 of Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009. Continental based this assertion on the assumption that, when a suspect crew oxygen mask stowage box unit is found with the placard already installed, it has already been re-worked and has since been returned to service.

We agree to include the revised service information in the supplemental NPRM. We have explained the revised service information in the ''Actions Since Previous NPRM was Issued'' section of this supplemental NPRM. The revised service information addresses the issues raised by JAL and Continental. We have revised the paragraphs specifying service information in this supplemental NPRM accordingly.

Request for Clarification Regarding Service Information for Other Models

Continental questioned why Boeing did not release service bulletins for other fleet types using the same part numbers listed in Intertechnique Service Bulletin MXP1/4–35–175, dated September 11, 2009. Continental explained that it has other fleets (for example, Model 737–500, 757–200, and 757–300 airplanes) that have the same crew oxygen mask stowage box unit part numbers, as delivered from Boeing. Continental reasoned that, because crew oxygen mask stowage box units are often swapped from aircraft to aircraft and borrowed from operator to operator, it will not only be inspecting its entire Model 737NG (next generation) fleet, but its other fleet types for these suspect serial numbers.

We find that clarification is necessary. Some airplanes were delivered with the affected part numbers and were not included in the applicability of the supplemental NPRM, because the manufacturing defect occurred in the time period from July 12, 2007, through November 20, 2007. Certain airplanes were not included in the service information because they were delivered prior to the time interval of the defect, thus were not included in the applicability of the supplemental NPRM.

Also, we now understand that the components identified with the manufacturing defect may have been installed on airplanes outside the effectivity of the service information after delivery (e.g., during maintenance activity). We are working to evaluate the associated risk and the need for additional action. We might consider further rulemaking to address our findings. We have not changed the supplemental NPRM in this regard.

Request for Alternative Method of Compliance (AMOC)

Continental stated that, if a later revision of the referenced service information is released, it would request approval of an AMOC because of minor discrepancies found in the original service information. Continental explained that it understood Revision 1 of the service information was going to be released prior to the issuance of any rulemaking, and that it has conveyed the minor discrepancies to Boeing.

As stated previously, we have revised this supplemental NPRM to refer to the revised service information—which addresses the discrepancies identified by Continental.

Request for Clarification

AVOX Systems Inc. (Avox) requested that we revise the NPRM (75 FR 67637, November 3, 2010) to include certain words, phrases, and deletions as follows:

- Where the NPRM (75 FR 67637, November 3, 2010) proposed to require replacing crew oxygen mask stowage box units, Avox requested specifying these units as 'affected.'
- Where the NPRM (75 FR 67637, November 3, 2010) proposed to require replacing with a new crew oxygen mask stowage box unit, Avox requested specifying replacement with a new 'or reworked' crew oxygen mask stowage box unit.
- Where the NPRM (75 FR 67637, November 3, 2010) proposed to require replacing with a new crew oxygen mask stowage box unit, Avox requested adding ''as required.'' Avox explained that, for crew oxygen mask stowage box units located on an airplane, it makes sense that these crew oxygen mask stowage box units should be inspected to determine if the crew oxygen mask stowage box unit is affected by the NPRM. If determined to be affected, the crew oxygen mask stowage box units should be removed and replaced with compliant crew oxygen mask stowage box units.

We partially agree with the request. We agree to designate units as ''affected,'' throughout the AD because that term adds clarity. We disagree to replace ''if necessary'' in the preamble of this supplemental NPRM with ''as required,'' because this phrase does not add clarity. We also disagree to add ''or reworked'' because we have revised paragraph (g)(1) of this AD to clarify that replacement crew oxygen mask stowage box units must be ''new or serviceable.''

Request To Allow Rework at Repair Station and Return to Service

Avox requested that we revise the NPRM (75 FR 67637, November 3, 2010) to allow for removed crew oxygen mask stowage box units to be sent to an authorized repair station to be reworked and returned to service.

We partially agree with the request. We note that Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, provides for return of the crew oxygen mask stowage box units to four authorized Intertechnique locations. However, we have not changed this supplemental NPRM in this regard.

Request To Include Inspection/ Replacement of Spare Crew Oxygen Mask Stowage Box Units

Avox also requested that we revise the NPRM (75 FR 67637, November 3, 2010) to include an inspection and replacement of spare crew oxygen mask stowage box units. Avox explained that, for crew oxygen mask stowage box units located in storage as spares, it makes sense that these crew oxygen mask stowage box units should be inspected to determine if the unit is affected by the NPRM. If determined to be affected, the crew oxygen mask stowage box unit should be removed from storage and sent to an authorized repair station to be reworked and returned to service.

We disagree with the request. Section 39.3 of the Federal Aviation Regulations (14 CFR 39.3) does not permit ADs to be written against parts that are not installed on an airplane. Therefore, paragraph (h) of this supplemental NPRM does not allow an affected spare unit to be installed on any airplane. We have not changed this supplemental NPRM in this regard.

Request for Review of Airplane Maintenance Records Inspection and Spare Parts

Delta requested that we revise paragraphs (g) and (h) of the NPRM (75 FR 67637, November 3, 2010) to include the option of conducting a review of airplane or component maintenance records, or spare parts purchase records, to demonstrate that an airline does not operate or own any crew oxygen mask stowage box units that were manufactured in the date range listed in the service information in the NPRM. Delta proposed that this action be an acceptable method of compliance in lieu of a visual inspection to show that airplane or spare crew oxygen mask stowage box units are not affected by the NPRM. Delta reasoned that affected crew oxygen mask stowage box unit part numbers can be verified, as required by the NPRM, to be not applicable by a part and serial number inspection or records review, or by review of purchase order records that verify the date of manufacture does not fall in the affected manufacturing date range.

We disagree with the request to include a review of airplane maintenance records or spare parts purchase records. Section 39.3 of the Federal Aviation Regulations (14 CFR 39.3) does not permit ADs to be written against parts that are not installed on an airplane. Therefore, an AD cannot require that operators inspect, repair, or modify a ''spare part.'' Also, because of the rotability of these parts, a component level record review may not sufficiently address the required action in the supplemental NPRM. As the previous NPRM (75 FR 67637, November 3, 2010) specified, it is still acceptable to conduct a review of airplane maintenance records in lieu of the inspection in paragraph (g) of this supplemental NPRM, if the serial number of the crew oxygen mask stowage box unit can be conclusively determined from that review. Operators may apply for approval of an AMOC for these actions in accordance with the provisions of paragraph (i) of this supplemental NPRM, if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety. We have not changed the supplemental NPRM in this regard.

FAA's Determination

We are proposing this supplemental NPRM because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs. Certain changes described above expand the scope of the original NPRM (75 FR 67637, November 3, 2010). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Proposed Requirements of the Supplemental NPRM

This supplemental NPRM would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 40 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85 per inspection cycle.	None	$85 per inspection cycle.	$3,400 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2010–1042; Directorate Identifier 2010–NM–094–AD.

(a) Comments Due Date

We must receive comments by October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company airplanes, certificated in any category, as identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Model 737–700, –700C, –800, –900ER series airplanes, as identified in Boeing Alert Service Bulletin 737–35A1121, Revision 1, dated November 7, 2011.

(2) Model 747–400F series airplanes, as identified in Boeing Alert Service Bulletin 747–35A2126, Revision 1, dated September 29, 2011.

(3) Model 767–200 and –300 series airplanes, as identified in Boeing Alert Service Bulletin 767–35A0057, Revision 1, dated November 17, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Unsafe Condition

This AD was prompted by reports indicating that certain crew oxygen mask stowage box units were possibly delivered with a burr in the inlet fitting. The burr may break loose during test or operation and might pose an ignition source or cause an inlet valve to jam. We are issuing this AD to prevent an ignition source, which could result in an oxygen-fed fire; or an inlet valve to jam in a crew oxygen mask stowage box unit, which could result in restricted flow of oxygen.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection and Corrective Action

Within 24 months after the effective date of this AD: Do a general visual inspection to determine if the serial number of the crew oxygen mask stowage box unit is identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, in accordance with the Accomplishment Instructions of the applicable Boeing alert service bulletin specified in paragraph (c)(1), (c)(2), or (c)(3) of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the crew oxygen mask stowage box unit can be conclusively determined from that review.

(1) If any crew oxygen mask stowage box unit has a serial number identified in table 1 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, replace the crew oxygen mask stowage box unit with a new or serviceable unit, in accordance with the Accomplishment Instructions of the applicable Boeing alert service bulletin specified in paragraph (c)(1), (c)(2), or (c)(3) of this AD.

(2) If any crew oxygen mask stowage box unit has a serial number identified in table 2 of the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, add the letter ''I'' to the end of the serial number (identified as ''SER'') on the identification label, in accordance with the Accomplishment Instructions of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011; and reinstall in accordance with the Accomplishment Instructions of the applicable Boeing alert service bulletin specified in paragraph (c)(1), (c)(2), or (c)(3) of this AD.

(3) If no crew oxygen mask stowage box unit has a serial number identified in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011: Before further flight, reinstall the crew oxygen mask stowage box unit, in accordance with the Accomplishment Instructions of the applicable Boeing alert service bulletin specified in paragraph (c)(1), (c)(2), or (c)(3) of this AD.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install a crew oxygen mask stowage box unit with a serial number listed in the Appendix of Intertechnique Service Bulletin MXP1/4–35–175, Revision 2, dated May 10, 2011, on any airplane.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Related Information

(1) For more information about this AD, contact Susan L. Monroe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind

Avenue SW., Renton, Washington 98057–3356; telephone: 425–917–6457; fax: 425–917–6590; email: *susan.l.monroe@faa.gov.*

(2) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* For Intertechnique service information identified in this AD, contact Zodiac, 2, rue Maurice Mallet—92137 Issy-les-Moulineaux Cedex France; telephone +33 1 41 23 23 23; fax +33 1 46 48 83 87; Internet *http://www.zodiac.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on August 31, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22040 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0111; Directorate Identifier 2011–NM–089–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for certain Airbus Model A330–200, A330–300, A340–200, and A340–300 series airplanes; and Model A340–541 airplanes and Model A340–642 airplanes. That NPRM proposed to require performing a detailed inspection for degradation of the bogie pivot pins and for any cracks and damage of the pivot pin bushes of the main and central landing gear; a magnetic particle inspection of the affected bogie pivot pins for corrosion and base metal cracks; and repairing or replacing bogie pivot pins and pivot pin bushes, if necessary. That NPRM was prompted by reports of cracks in the bogie pivot pin caused by material heating due to friction between the bogie pivot pin and bush, leading to chrome detachment and chrome dragging on the bogie pivot pin. This action revises that NPRM by adding repetitive inspections and expanding the applicability. We are proposing this AD to detect and correct cracks and damage to the main and central landing gear, which could result in the collapse of the landing gear and adversely affect the airplane's continued safe flight and landing. Since these actions impose an additional burden over that proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this proposed AD by October 22, 2012.

ADDRESSES: You may send comments by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Fax: (202) 493–2251.
- Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- Hand Delivery: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0111; Directorate Identifier 2011–NM–089–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on February 10, 2012 (77 FR 7007). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

Since that NPRM (77 FR 7007, February 10, 2012) was issued, we have determined that repetitive inspections of the bogie pivot pin are necessary to address the identified unsafe condition, and we have expanded the applicability to include all Airbus Model A330–200, A330–200 Freighter, A330–300, A340–200, and A340–300 series airplanes; and Model A340–541 and Model A340–642 airplanes.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0053, dated March 30, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> During removals of A330/340 Main Landing Gear (MLG) Bogie Beams and A340–500/600 Center Landing Gear (CLG) Bogie Beams, cracks in the bogie pivot pin were found.
>
> Investigations indicated that these findings were the result of material heating, caused by friction between bogie pivot pin and bush, leading to chrome detachment and stress corrosion cracking.

This condition, if not detected and corrected, could lead to collapse of the main or center landing gear, possibly resulting in damage to the aeroplane and/or injury to occupants.

As a precautionary measure, EASA issued AD 2011–0040 to require a one-time [detailed] inspection of the MLG (all types of A330 and A340 aeroplanes) and CLG (A340–500/600 aeroplanes only) to detect degradation or cracking of the bogie pivot pin [and to detect cracks and damage of the bushes], as applicable to aeroplane model, and the reporting of inspections results.

Following issuance of EASA AD 2011–0040, several operators reported finding chrome detachment or chrome dragging on bogie pivot pin. New cases of cracks were also reported. It has been confirmed as well that, due to similar design, the enhanced MLG bogie pivot pin (Airbus modification 54500) could also be affected by this condition.

Prompted by these findings, Airbus have developed an inspection programme consisting of repetitive inspections of the bogie pivot pin and applicable corrective actions.

For the reasons described above, this [EASA] AD, which supersedes EASA AD 2011–0040 and extends the applicability to all A330 and A340 aeroplanes, requires accomplishment of repetitive inspections of the MLG and CLG (for A340–500 and A340–600 aeroplanes) bogie pivot pins and pivot pin bushes, and corrective actions, depending on findings.

Required actions also include, for certain airplanes, a magnetic particle inspection of the bogie pivot pin for corrosion and base metal cracks. The corrective actions include replacing any cracked or damaged pivot pin bush with a new or serviceable pivot pin bush, and replacing any corroded or cracked bogie pin with a new bogie pin. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued the following service bulletins:

- Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).
- Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).
- Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Comments

We gave the public the opportunity to comment on the original NPRM (77 FR 7007, February 10, 2012). We received no comments on that NPRM or on the determination of the cost to the public.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Certain changes described above expand the scope of the earlier NPRM (77 FR 7007, February 10, 2012). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 29 products of U.S. registry. We also estimate that it would take about 22 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $54,230, or $1,870 per product.

In addition, we estimate that any necessary follow-on actions would take about 6 work-hours and require parts costing $21,222, for a cost of $21,732 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2012–0111; Directorate Identifier 2011–NM–089–AD.

(a) Comments Due Date

We must receive comments by October 22, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A330–201, –202, –203, –223, –243, –223F, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; Model A340–211, –212, –213, –311, –312, and –313 airplanes; and Model A340–541 and Model A340–642 airplanes; certificated in any category; all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by reports of cracks in the bogie pivot pin caused by material heating due to friction between the bogie pivot pin and bush, leading to chrome detachment and chrome dragging on the bogie pivot pin. We are issuing this AD to detect and correct cracks and damage to the main and central landing gear, which could result in the collapse of the landing gear and adversely affect the airplane's continued safe flight and landing.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Detailed Inspection

Within 26 months after the effective date of this AD or 26 months after the first flight of the airplane, whichever occurs later; but no earlier than 12 months after the first flight of the airplane: Do a detailed inspection for degradation (i.e., loss of chromium plate, loose chromium, sharp edges) of the bogie pivot pins and for any cracks and damage of the pivot pin bushes of the main landing gear, and as applicable, the central landing gear, in accordance with the Accomplishment Instructions of the applicable service bulletin specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD. Repeat the inspection thereafter at intervals not to exceed 26 months. Accomplishment of an overhaul of the landing gear does not substitute the accomplishment of the inspection as required by this paragraph.

(1) Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(2) Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).

(3) Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

(h) Corrective Action if any Pivot Pin Bush is Found Cracked or Damaged

If, during any inspection required by paragraph (g) of this AD, any pivot pin bush is found cracked or damaged: Before further flight, repair or replace the pivot pin bush with a new or serviceable pivot pin bush, in accordance with the Accomplishment Instructions of the applicable service bulletin specified paragraph (h)(1), (h)(2), or (h)(3) of this AD.

(1) Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(2) Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).

(3) Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

(i) Corrective Action if Any Bogie Pivot Pin is Found With Degraded Chrome Plating

If, during any inspection required by paragraph (g) of this AD, degraded chrome plating on any bogie pivot pin is found: Before further flight, do a non-destructive test (magnetic particle inspection) of the affected bogie pivot pin for corrosion and base metal cracks, in accordance with the Accomplishment Instructions of the applicable service bulletin specified paragraph (i)(1), (i)(2), or (i)(3) of this AD.

(1) Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(2) Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).

(3) Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

(j) Corrective Action if Any Bogie Pivot Pin Is Found Corroded or the Base Metal Is Found Cracked During the Non-Destructive Test

If, during the non-destructive test (magnetic particle inspection) specified in paragraph (i) of this AD, the bogie pivot pin is found corroded or the base metal is cracked: Before further flight, repair or replace the bogie pin with a new or serviceable bogie pin, in accordance with the Accomplishment Instructions of the applicable service bulletin specified paragraph (j)(1), (j)(2), or (j)(3) of this AD.

(1) Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(2) Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).

(3) Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

(k) No Terminating Action

Accomplishment of the corrective actions required by paragraphs (h) and (j) does not terminate the repetitive inspections in paragraph (g) of this AD.

(l) Reporting Requirement

Submit a one-time report of the findings (both positive and negative) of the inspections required by paragraphs (g) and (i) of this AD to Airbus, Customer Services Directorate, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex France, ATTN: SDC32 Technical Data and Documentation Services; fax (+33) 5 61 93 28 06; email *sb.reporting@airbus.com;* at the applicable time specified in paragraph (l)(1) or (l)(2) of this AD. The report must include the inspection results and description of any discrepancies found.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 90 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 90 days after the effective date of this AD.

(m) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraphs (g) through (j) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (m)(1) through (m)(4) of this AD, which are not incorporated by reference in this AD.

(1) Airbus Mandatory Service Bulletin A330–32–3240, including Appendix 1, dated December 8, 2010 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(2) Airbus Mandatory Service Bulletin A330–32–3240, including Appendix 1, Revision 01, dated May 4, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(3) Airbus Mandatory Service Bulletin A340–32–4281, including Appendix 1, dated December 8, 2010 (for Airbus Model A340–200 series airplanes and Model A340–300 series airplanes).

(4) Airbus Mandatory Service Bulletin A340–32–5096, including Appendix 1, dated December 8, 2010 (for Model A340–541 airplanes and Model A340–642 airplanes).

(n) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN:

Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(o) Related Information

(1) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2012–0053, dated March 30, 2012, and the service information specified in paragraphs (o)(1)(i) through (o)(1)(iii) of this AD, for related information.

(i) Airbus Mandatory Service Bulletin A330–32–3240, Revision 02, including Appendices 01 and 02, dated December 2, 2011 (for Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, and Model A330–300 series airplanes).

(ii) Airbus Mandatory Service Bulletin A340–32–4281, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–200 series airplanes and Model A340–300 series airplanes).

(iii) Airbus Mandatory Service Bulletin A340–32–5096, Revision 01, including Appendices 01 and 02, dated December 2, 2011 (for Model A340–541 airplanes and Model A340–642 airplanes).

(2) For service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on August 31, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–22063 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0945; Directorate Identifier 2010–SW–110–AD]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation (Sikorsky) Model Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the Sikorsky Model S–70, S–70A, S–70C, S–70C (M), and S–70C (M1) helicopters with General Electric (GE) T700–GE–401C or T700–GE–701C engines installed. This proposed AD is prompted by a reevaluation of the method for determining the life limit for certain GE engine gas generator turbine (GGT) rotor parts and the determination that these life limits need to be based on low cycle fatigue events instead of hours time-in-service. The proposed actions are intended to establish new fatigue life limits for certain GGT rotor parts to prevent fatigue failure of a GGT rotor part, engine failure, and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by November 6, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed AD, contact Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (800) 562–4409, email address *tsslibrary@sikorsky.com*, or at *http://www.sikorsky.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Michael Davison, Flight Test Engineer, New England Regional Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7156; fax: (781) 238–7170; email: *michael.davison@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is

possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

We propose to adopt a new AD for the specified helicopters with GE part-numbered T700–GE–401C or specified T700–GE–701C engines installed. This proposed AD would require establishing a new life limit for certain GGT rotor parts based upon the accumulated low cycle fatigue events of the GGT rotor parts. This proposed AD is prompted by the determination that the affected engines could fail due to fatigue unless the life limits of certain GE engine rotor parts are changed from hours time-in-service to low cycle fatigue events. The GE T700–GE–701C engine is used in the military's UH–60 fleet. Analysis and experience with this engine have caused the military to reduce the life limit of certain GGT rotor parts and to revise their maintenance documentation to reflect these revised life limits. The Sikorsky Model S–70 helicopters are similar to the military's UH–60 fleet, some of which have been certificated by the FAA in the restricted category. The GE T700–GE–701C engine has not been type-certificated by the FAA for civil use, except to the extent that it is a part of a restricted category Model S–70 helicopter.

FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

GE has issued GE T700 Turboshaft Engine Service Bulletin (ESB) 72–0038, dated October 1, 2008, for the T700–GE–701C engine (ESB 72–0038) and GE T700 Turboshaft ESB 72–0041, dated August 21, 2009, for the T700–GE–401C engine (ESB SB 72–041). These ESBs define a ''full-cycle event'' and a ''partial cycle event,'' specify a method of calculating the low cycle fatigue (LCF) life limit using formulas and LCF Limit Diagrams, and specify counting LCF events to determine the remaining fatigue life for specified GGT rotor parts. Finally, the ESBs specify removing each life-limited rotor part from service when its newly-established LCF life limit is reached.

Proposed AD Requirements

This proposed AD would require, before further flight:

- Inserting the LCF limit diagrams into the airworthiness limitation section of the maintenance manual or instructions for continued airworthiness, shown in Figures 2 through 7 (pages 9 through 14) of ESB 72–0041 or Figures 2 through 4 (pages 10 through 12) of ESB 72–0038.
- Obtaining the actual LCF1 and LCF2 count from the engine ''history recorder'' (HR), and calculating the LCF1 and LCF2 fatigue retirement life for each GGT rotor part.
- Replacing each GGT rotor part that has reached the new fatigue cycle life limit with an airworthy rotor part.
- Calculating the life limit for the GGT rotor part with the hours time-in-service for the part as shown in Table 1 of ESB 72–0041, for those helicopters with the GE T700–GE–401C engine where the number of low cycle fatigue events cannot be determined manually from the HR or by combining both manual and HR counts.
- Before further flight, beginning or continuing to count the full and partial low fatigue cycle events and recording on the component card or equivalent record that count at the end of each day for which the HR is inoperative.

Costs of Compliance

We estimate that this proposed AD would affect 9 helicopters of U.S. registry. We estimate that operators may incur the following costs in order to comply with this AD:

- A minimal amount for work hours and labor costs because these parts are replaced as part of the periodic maintenance on the helicopter;
- A minimal amount of time to calculate the new retirement life;
- $360,000 to replace the GGT rotor parts per helicopter; and
- $3,240,000 to replace the GGT rotor parts for the entire U.S. operator fleet.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new Airworthiness Directive (AD):

Sikorsky Aircraft Corporation: Docket No. FAA–2012–0945; Directorate Identifier 2010–SW–110–AD.

(a) Applicability

This AD applies to Model S–70, S–70A, S–70C, S–70C (M), and S–70C (M1) helicopters with General Electric (GE) T700–GE–401C or T700–GE–701C part-numbered engines, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a critical engine part remaining in service beyond its fatigue life because the current life limit is based on hours time-in-service (TIS) instead of fatigue cycles. This condition could result in fatigue failure of an engine rotor part, engine failure, and subsequent loss of control of the helicopter.

(c) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(d) Required Actions

(1) Before further flight, insert into the airworthiness limitation section of the maintenance manual or instructions for continued airworthiness the low cycle fatigue (LCF) limit diagrams shown in Figures 2 through 7 (pages 9 through 14) of GE T700 Turboshaft Engine Service Bulletin (ESB) No. T700 S/B 72–0041, dated August 21, 2009, for helicopters with the GE T700–GE–401C engine, or Figures 2 through 4 (pages 10 through 12) of GE T700 Turboshaft ESB No. T700 S/B 72–0038, dated October 1, 2008, for helicopters with the GE T700–GE–701C engine. The diagonal line on each diagram represents the new cycle life limit (a combination of full low cycle fatigue events (LCF1) and partial low cycle fatigue events (LCF2) as those terms are defined in the Accomplishment Instructions, paragraphs 3.A.(1) and 3.A.(2) of each ESB) for each gas generator turbine (GGT) rotor part. A combination of LCF1 and LCF2, which results in a number below the diagonal line of the applicable diagram for each engine, indicates that the part has not reached its fatigue life limit.

(2) Before further flight:

(i) Obtain the actual LCF1 and LCF2 count from the engine ''history recorder'' (HR);

(ii) Calculate the LCF1 and LCF2 fatigue retirement life for each GGT rotor part as follows:

(A) Determine the actual LCF ratio by dividing the total actual LCF2 cycle count obtained from the HR by the total actual LCF1 cycle count obtained from the HR. Add to the actual counts from the HR any actual additional fatigue cycle incurred during any period in which the HR was inoperative.

(B) Determine the LCF1 retirement life by dividing the maximum number of LCF2 events obtained from the applicable diagram for each engine by the sum of the actual LCF ratio obtained by following paragraph (d)(2)(ii)(A) of this AD plus the quotient of the maximum number of LCF2 events from the applicable diagram for each engine divided by the maximum number of LCF1 events from the applicable diagram for each engine.

(C) Determine the LCF2 retirement life by multiplying the actual LCF ratio obtained by following paragraph (d)(2)(ii)(A) of this AD times the LCF1 retirement life determined by following paragraph (d)(2)(ii)(B) of this AD.

(iii) Replace each GGT rotor part that has reached the new fatigue cycle life limit with an airworthy rotor part.

(3) For helicopters with the GE T700–GE–401C engine, if you cannot determine the number of low cycle fatigue events manually from the HR or by combining both manual and HR counts, then the life limit for the GGT rotor part is the hours TIS for the part as shown in Table 1 of ESB No. T700 S/B 72–0041, dated August 21, 2009.

(4) Before further flight, begin or continue to count the full and partial low fatigue cycle events and record on the component card or equivalent record that count at the end of each day for which the HR is inoperative.

(e) Special Flight Permit

Special flight permits will not be issued to allow flight in excess of life limits.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Michael Davison, Flight Test Engineer, New England Regional Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7156; fax: (781) 238–7170; email: *michael.davison@faa.gov.*

(2) For operations conducted under 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

For service information identified in this AD, contact Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (800) 562–4409, email address *tsslibrary@sikorsky.com*, or at *http://www.sikorsky.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 7250: Turbine Section.

Issued in Fort Worth, Texas, on August 30, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–22064 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0926; FRL–9725–2]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas and Permits for Major Stationary Sources Locating in Nonattainment Areas or the Ozone Transport Region

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the Virginia Department of Environmental Quality (VADEQ). These revisions propose to allow the terms and conditions of various elements of the preconstruction program in Virginia to be combined into a single permit, establish limitations for issuance of Plantwide Applicability Limits (PALs), and provide an exemption to Virginia's New Source Review (NSR) Program for the use of alternate fuels. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before October 9, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0926 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2011–0926, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0926. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the Virginia submittal are available at the VADEQ Office, 629 East Main Street, Richmond, Virginia 23218.

FOR FURTHER INFORMATION CONTACT: Gerallyn Duke, (215) 814–2084, or by email at *duke.gerallyn@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On September 27, 2010, VADEQ submitted revisions to its SIP that would allow terms and conditions from multiple preconstruction permits issued to a single stationary source to be combined into a single permit. The SIP revision also establishes state operating permits for major sources as the mechanism for issuing PAL permits. It also provides an exemption in Virginia's Prevention of Significant Deterioration (PSD) and nonattainment NSR programs for the use of alternate fuels, and makes certain minor administrative revisions to the current SIP.

I. Background

Section 110(a)(2)(C) of the CAA requires SIPs to have a a preconstruction permit program for both major and minor sources. More specifically, SIPs must have the permit programs required under subparts C and D of title I (i.e., PSD and nonattainment NSR) and the SIP must have a minor preconstruction program that assures that the national ambient air quality standards (NAAQS) are achieved. The current Virginia SIP implements these requirements by issuing separate permits under each program. Consequently, a single project at a stationary source may require multiple permits depending on the type and amount of pollutants to be emitted. Virginia has found that maintaining multiple permits for major stationary sources has resulted in a significant workload burden and causes confusion as to where permit conditions reside, leading to compliance issues.

The proposed SIP revisions will allow preconstruction permits for major stationary sources to be combined into one permit with certain restrictions and conditions. Permit terms and conditions at major sources may be combined into one permit at the request of the Virginia State Air Pollution Control Board or by the permittee. Actions to combine permit terms and conditions must include a statement referencing the origin of the term or condition, its effective date and whether it is state and/or federally enforceable. All terms and conditions of contributing permits must be included in the combined permit without change and the combined permit will supercede the contributing permit. Redundant terms and conditions may be removed from the combined permit but the regulatory basis of the removed term or condition must be included. The state may also streamline permit conditions where two or more terms or conditions apply to the same unit and one is substantially more stringent.

On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52 regarding the CAA's PSD and nonattainment NSR programs that are collectively known as NSR Reform. These changes included provisions that would allow major stationary sources to comply with a PAL to avoid having a significant emissions increase that triggers the requirements of the major NSR program. EPA granted limited approval of Virginia's NSR Reform regulations on October 22, 2008 (73 FR 62897). In the current version of the Virginia SIP, PALs may be implemented through a major NSR permit, a minor NSR permit or a state operating permit. This is consistent with the federal rules at 40 CFR 51.165(f)(2)(ix) and 51.166(w)(2)(ix) with respect to the definition of ''PAL permit.'' All three permitting mechanisms in the Virginia SIP are acceptable means for establishing a PAL. The proposed SIP revision would limit establishing PALs to state operating permits. States have discretion in choosing among the enforceable mechanisms provided in the definition of ''PAL permit'' and Virginia's selection of a state operating permit is consistent with the options provided in the federal rules.

In 2008, the Virginia General Assembly amended Va. Code Sec. 10.1322.4 to allow exemptions for alternative fuels and raw materials from permit requirements. The proposed SIP revision is intended to ensure that there are no conflicts between the Virginia Code and Federal regulations, including the SIP. On March 24, 2011, the Director of the Air Division at VADEQ issued Air Guidance Memo No. APG–308 which clarified that the exemption from permitting for the use of alternative fuels does not allow a source to bypass NSR for major sources or any other federal law or regulation. This document is included in the docket for this proposed rulemaking action.

II. Summary of SIP Revision

The amendments submitted by VADEQ for approval into the SIP were adopted by the State Air Pollution Control Board on June 8, 2009 and became effective on July 23, 2009. They include revisions to the VADEQ regulations at 9VAC5 Chapter 80, Article 8 (Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas) and Article 9 (Permits for Major Stationary Sources and Modifications Locating in Nonattainment Areas or the Ozone Transport Region). The following regulations under Article 8 are revised: Regulation 5–80–1615 (Definitions), Regulation 5–80–1625 (General), Regulation 5–80–1695 (Exemptions), Regulation 5–80–1925 (Changes to permits), Regulation 5–80–1935 (Administrative permit amendments), Regulation 5–80–1945 (Minor permit amendments), Regulation 5–80–1955 (Significant amendment procedures), and Regulation 5–80–1965 (Reopening for cause). Under Article 9, Regulation 5–80–2010 (Definitions), Regulation 5–80–2020 (General), Regulation 5–80–2140 (Exception), Regulation 5–80–2200

(Changes to permits), Regulation 5–80–2210 (Administrative permit amendments), Regulation 5–80–2220 (Minor permit amendments), and Regulation 5–80–2230 (Significant amendment procedures) are amended. Under Article 8, Regulation 5–80–1915 (Actions to combine permit terms and conditions) is added and under Article 9, Regulation 5–80–2195 (also called ''Actions to combine permit terms and conditions'') is added.

We are proposing approval of Virginia's SIP submission dated September 27, 2010 that consists of the following actions that pertain to Virginia's PSD and nonattainment NSR Programs: (1) Adding provisions to allow the terms and conditions of the various elements of the NSR Program to be combined into a single permit; (2) limiting the issuance of PALs to the state operating permit program; (3) providing certain exemptions from permitting for alternative fuels unless required by federal law or regulation; and (4) making minor administrative amendments.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information: (1) That are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD and NSR programs consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Proposed Action

Based upon EPA's review of the September 27, 2010 submittal, we find the regulations are consistent with their Federal counterparts. EPA is proposing to approve the Virginia SIP revisions which add provisions to allow the terms and conditions of the various elements of the PSD and nonattainment NSR Programs to be combined into a single permit; limit the issuance of PALs to the state operating permit program; provide exemptions from permitting for alternative fuels; and make minor administrative changes. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National

Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule related to Virginia permits for major stationary sources and major modifications locating in PSD or Nonattainment Areas or the Ozone Transport Region does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 23, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–22094 Filed 9–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0305; FRL–9724–9]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Maryland Department of the Environmental (MDE) on April 4, 2012. This revision proposes to defer until July 21, 2014 the application of the Prevention of Significant Deterioration (PSD) permitting requirements to biogenic carbon dioxide (CO_2) emissions from bioenergy and other biogenic stationary sources in the State of Maryland. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before October 9, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0305 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0305, Ms. Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0305. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Mr. David Talley, (215) 814–2117, or by email at *talley.david@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On April 4, 2012, MDE submitted a revision (#12–02) to its State Implementation Plan (SIP) to maintain consistency with Federal greenhouse gas (GHG) permitting requirements under the PSD program.

I. Background

A. The Tailoring Rule

On June 3, 2010 (effective August 2, 2010), EPA promulgated a final rulemaking, the Tailoring Rule, for the purpose of relieving overwhelming permitting burdens from the regulation of GHG's that would, in the absence of the rule, fall on permitting authorities and sources (75 FR 31514). EPA accomplished this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD program of the CAA. In particular, EPA established in the Tailoring Rule a phase-in approach for PSD applicability and established the first two steps of the phase-in for the largest GHG-emitters.

For the first step of the Tailoring Rule, which began on January 2, 2011, PSD requirements apply to major stationary source GHG emissions only if the sources are subject to PSD anyway due to their emissions of non-GHG pollutants. Therefore, in the first step, EPA did not require sources or modifications to evaluate whether they are subject to PSD requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most noticeably the best available control technology

(BACT) requirement as defined in CAA section 169(3), apply to projects that increase net GHG emissions by at least 75,000 tons per year (tpy) of CO_2 equivalent (CO_2e), but only if the project also significantly increases emissions of at least one non-GHG pollutant. CO_2e is a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWP's and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

The second step of the Tailoring Rule, which began on July 1, 2011, phased in additional large sources of GHG emissions. New sources that emit, or have the potential to emit (PTE), at least 100,000 tpy CO_2e are subject to the PSD requirements. In addition, sources that emit or have the PTE at least 100,000 tpy CO_2e and that undertake a modification that increases net GHG emissions by at least 75,000 tpy CO_2e are also be subject to PSD requirements. For both steps, EPA noted that if sources or modifications exceed these CO_2e-adjusted GHG triggers, they are not covered by permitting requirements unless their GHG emissions also exceed the corresponding mass-based triggers in tpy.

Maryland implements its PSD program by incorporating 40 CFR 52.21 by reference, under COMAR 26.11.06.14B(1). This incorporation references a date specific version of the CFR and is updated periodically and submitted to EPA for approval into the SIP. In order to adopt the Tailoring Rule, Maryland's previous update incorporated 40 CFR 52.21 ''as published in the 2009 edition, as amended by the 'Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule' (75 FR 31514).'' EPA approved this revision into the Maryland SIP on August 2, 2012 (77 FR 45949).

B. EPA's Biomass Deferral Rule

On July 20, 2011, EPA promulgated the final ''Deferral for CO_2 Emissions from Bioenergy and other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs'' (Biomass Deferral). Following is a brief discussion of the deferral. For a full discussion of EPA's rationale for the rule, see the notice of final rulemaking at 76 FR 43490.

The biomass deferral delays until July 21, 2014 the consideration of CO_2 emissions from bioenergy and other biogenic sources (hereinafter referred to as ''biogenic CO_2 emissions'') when determining whether a stationary source meets the PSD and Title V applicability thresholds, including those for the application of BACT [1]. Stationary sources that combust biomass (or otherwise emit biogenic CO_2 emissions) and construct or modify during the deferral period will avoid the application of PSD to the biogenic CO_2 emissions resulting from those actions. The deferral applies only to biogenic CO_2 emissions and does not affect non-GHG pollutants or other GHG's (e.g., methane (CH_4) and nitrous oxide (N_2O)) emitted from the combustion of biomass fuel. Also, the deferral only pertains to biogenic CO_2 emissions in the PSD and Title V programs and does not pertain to any other EPA programs such as the GHG Reporting Program.

Biogenic CO_2 emissions are defined as emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon. Examples of ''biogenic CO_2 emissions'' include, but are not limited to:

- CO_2 generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from fermentation during ethanol production or other industrial fermentation processes;
- CO_2 from combustion of the biological fraction of municipal solid waste or biosolids;
- CO_2 from combustion of the biological fraction of tire-derived fuel; and
- CO_2 derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

EPA recognizes that use of certain types of biomass can be part of the national strategy to reduce dependence on fossil fuels. Efforts are underway at the Federal, state and regional level to foster the expansion of renewable resources and promote bioenergy projects when they are a way to address climate change, increase domestic alternative energy production, enhance forest management and create related employment opportunities. We believe part of fostering this development is to ensure that those feedstocks with negligible net atmospheric impact not be subject to unnecessary regulation. At the same time, it is important that EPA have time to conduct its detailed examination of the science and technical issues related to accounting for biogenic CO_2 emissions and therefore have finalized this deferral. The deferral is intended to be a temporary measure, in effect for no more than three years, to allow the Agency time to complete its work and determine what, if any, treatment of biogenic CO_2 emissions should be in the PSD and Title V programs. The biomass deferral rule is not EPA's final determination on the treatment of biogenic CO_2 emissions in those programs. The Agency plans to complete its science and technical review and any follow-on rulemakings within the three-year deferral period and further believes that three years is ample time to complete these tasks. It is possible that the subsequent rulemaking, depending on the nature of EPA's determinations, would supersede the biomass deferral rulemaking and become effective in fewer than three years. In that event, Maryland may revise its SIP accordingly.

For stationary sources co-firing fossil fuel and biologically-based fuel, and/or combusting mixed fuels (e.g., tire derived fuels, municipal solid waste (MSW)), the biogenic CO_2 emissions from that combustion are included in the biomass deferral. However, the fossil CO_2 emissions are not. Emissions of CO_2 from processing of mineral feedstocks (e.g., calcium carbonate) are also not included in the deferral. Various methods are available to calculate both the biogenic and fossil portions of CO_2 emissions, including those methods contained in the GHG Reporting Program (40 CFR Part 98). Consistent with the other pollutants in PSD and Title V, there are no requirements to use a particular method in determining biogenic and fossil CO_2 emissions.

EPA's final biomass deferral rule is an interim deferral for biogenic CO_2 emissions only and does not relieve sources of the obligation to meet the PSD and Title V permitting requirements for other pollutant emissions that are otherwise applicable to the source during the deferral period or that may be applicable to the source at a future date pending the results of

[1] As with the Tailoring Rule, the Biomass Deferral addresses both PSD and Title V requirements. However, EPA is only taking action on Maryland's PSD program as part of this action.

EPA's study and subsequent rulemaking action. This means, for example, that if the deferral is applicable to biogenic CO_2 emissions from a particular source during the three-year effective period and the study and future rulemaking do not provide for a permanent exemption from PSD and Title V permitting requirements for the biogenic CO_2 emissions from a source with particular characteristics, then the deferral would end for that type of source and its biogenic CO_2 emissions would have to be appropriately considered in any applicability determinations that the source may need to conduct for future stationary source permitting purposes, consistent with that subsequent rulemaking and the Final Tailoring Rule (*e.g.,* a major source determination for Title V purposes or a major modification determination for PSD purposes). EPA also wishes to clarify that we do not require that a PSD permit issued during the deferral period be amended or that any PSD requirements in a PSD permit existing at the time the deferral took effect, such as BACT limitations, be revised or removed from an effective PSD permit for any reason related to the deferral or when the deferral period expires.

Section 52.21(w) of 40 CFR requires that any PSD permit shall remain in effect, unless and until it expires or it is rescinded, under the limited conditions specified in that provision. Thus, a PSD permit that is issued to a source while the deferral was effective need not be reopened or amended if the source is no longer eligible to exclude its biogenic CO_2 emissions from PSD applicability after the deferral expires. However, if such a source undertakes a modification that could potentially require a PSD permit and the source is not eligible to continue excluding its biogenic CO_2 emissions after the deferral expires, the source will need to consider its biogenic CO_2 emissions in assessing whether it needs a PSD permit to authorize the modification.

Any future actions to modify, shorten, or make permanent the deferral for biogenic sources are beyond the scope of the biomass deferral action and this proposed approval of the deferral into the Maryland SIP, and will be addressed through subsequent rulemaking. The results of EPA's review of the science related to net atmospheric impacts of biogenic CO_2 and the framework to properly account for such emissions in Title V and PSD permitting programs based on the study are prospective and unknown. Thus, we are unable to predict which biogenic CO_2 sources, if any, currently subject to the deferral as incorporated into the Maryland SIP would be subject to any permanent exemptions or which currently deferred sources would be potentially required to account for their emissions in the future rulemaking EPA has committed to undertake for such purposes in three or fewer years. Only in that rulemaking can EPA address the question of extending the deferral or putting in place requirements that would have the equivalent effect on sources covered by the biomass deferral. Once that rulemaking has occurred, Maryland may address related revisions to its SIP.

II. Summary of SIP Revision

Similar to our approach with the Tailoring Rule, EPA incorporated the biomass deferral into the regulations governing state programs and into the Federal PSD program by amending the definition of ''subject to regulation'' under 40 CFR sections 51.166 and 52.21 respectively. As discussed above, Maryland implements its PSD program by incorporating section 52.21 by reference. This incorporation references a date specific version of the CFR and is updated periodically and submitted to EPA for approval into the SIP. In order to adopt the Biomass Deferral, Maryland has revised COMAR 26.11.06.14B(1) to incorporate the 2009 version of 40 CFR 52.21 ''as amended by'' the Tailoring Rule and the Biomass Deferral. Additionally, the definitions of ''PSD source'' and greenhouse gas'' at COMAR 26.11.01.01 and 26.11.02.01 respectively have been revised to incorporate the Biomass Deferral.

III. Proposed Action

EPA's review of this material indicates that it is consistent with Federal regulations. EPA is proposing to approve the Maryland SIP revision incorporating the Biomass Deferral, which was submitted on April 4, 2012. EPA is soliciting public comments on this proposed approval of Maryland's SIP revision request. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule relating to the Biomass Deferral and GHG permitting under Maryland's PSD program does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 23, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–22098 Filed 9–6–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 10

[Docket No. USCG–2012–0734]

Medical Waivers for Merchant Mariner Credential Applicants With Anti-Tachycardia Devices or Implantable Cardioverter Defibrillators

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed policy change and request for comments.

SUMMARY: The Coast Guard is seeking public comment regarding criteria for granting medical waivers to mariners who have anti-tachycardia devices or implantable cardioverter defibrillators (ICDs). Current Coast Guard guidance found in Navigation and Vessel Inspection Circular 04–08, *Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials* (NVIC 04–08), states that anti-tachycardia devices or ICDs are generally not waiverable. The Coast Guard is considering changing that policy. Prior to issuing a policy change on whether to grant waivers for anti-tachycardia devices or ICDs and the criteria for such waivers, the Coast Guard will accept comments from the public on whether the proposed criteria would adequately address safety concerns regarding merchant mariners with ICDs.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before October 9, 2012 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0734 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call or email Lieutenant Ashley Holm, Mariner Credentialing Program Policy Division (CG–CVC–4), U.S. Coast Guard, telephone 202–372–1128, email *MMCPolicy@uscg.mil.* If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation

You may submit comments and related material regarding whether this proposed policy change should be incorporated into a final policy on issuing medical waivers to mariners with ICDs. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2012–0734) and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and insert ''USCG–2012–0734'' in the ''Search'' box. Click ''Search,'' find this notice in the list of Results, and then click on the corresponding ''Comment Now'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments: To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov* and insert ''USCG–2012–0734'' in the ''Search'' box. Click ''Search'' and use the filters on the left side of the page to highlight ''Public Submissions'' or other document types. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Background and Purpose

Coast Guard regulations in 46 CFR 10.215 contain the medical standards that merchant mariners must meet prior to being issued a merchant mariner credential (MMC). In cases where the mariner does not meet the medical standards in 46 CFR 10.215, the Coast Guard may issue a waiver when extenuating circumstances exist that warrant special consideration. *See* 46 CFR 10.215(g).

In NVIC 04–08, the Coast Guard states that anti-tachycardia devices and ICDs are generally not waiverable. Since the issuance of NVIC 04–08 on September 15, 2008, a number of mariners have sought and received waivers for anti-tachycardia devices or ICDs in accordance with 46 CFR 10.215(g). However, because NVIC 04–08 does not identify waiver criteria associated with anti-tachycardia devices or ICDs, it has been difficult for Coast Guard personnel to consistently evaluate merchant mariners with anti-tachycardia devices or ICDs and assess whether an applicant's medical condition warrants granting a medical waiver under 46 CFR 10.215(g). Accordingly, the Coast Guard is considering whether to change its policy regarding waivers for anti-tachycardia devices or ICDs, and under what criteria a mariner may be eligible for waiver consideration.

The Coast Guard intends to consider public input as well as the recommendations of the Merchant Mariner Medical Advisory Committee, established under the authority of 46

U.S.C. 7115, prior to establishing a final policy on whether waivers should be granted for anti-tachycardia devices or ICDs, and if so, under what circumstances. Because of the complexity of the issues involved, the Coast Guard intends to thoroughly analyze the issues prior to issuing the final policy.

The Coast Guard specifically requests public comment on the likelihood of an ICD inappropriately firing and whether that shock could potentially incapacitate a merchant mariner. Additionally, the Coast Guard seeks public comment on whether the criteria listed below are appropriate and sufficient to evaluate whether a mariner should be eligible for consideration for a medical waiver under 46 CFR 10.215(g).

Below is a series of 12 questions we are considering as the criteria for granting a medical waiver. A review of the mariner's record should lead the Coast Guard to answer ''no'' for each question in order for the mariner to be eligible for waiver consideration. We request public comment regarding whether the 12 questions below represent an appropriate and sufficient list of the criteria a mariner should be required to meet in order to be eligible for waiver consideration, or whether we should eliminate or modify any of the questions, or add other questions to the list.

(1) Does the mariner have a diagnosis of a cardiac channelopathy affecting the electrical conduction of the heart (including Brugada syndrome, Long QT syndrome, etc.)?

(2) Does the mariner have a prior history of ventricular fibrillation or episodes of sustained ventricular tachycardia and, if so, did the arrhythmia episode occur greater than three years ago?

(3) Was the ICD or anti-tachycardia device implanted more than three years ago?

(4) Has the ICD fired or has the mariner required anti-tachycardia pacing within the last three years?

(5) Does the mariner's condition present any confounding risk factors for inappropriate shock such as uncontrolled atrial fibrillation?

(6) Is the mariner's ejection fraction greater than 40% with a steady or improving trend?

(7) Does the mariner have a history of any symptomatic or clinically significant heart failure in the past two years?

(8) Does the mariner's record contain any evidence of significant reversible ischemia on myocardial perfusion imaging exercise stress testing?

(9) Has the mariner's exercise capacity been assessed to be greater than or equal to 10 metabolic equivalents (METs)?

(10) Did the mariner provide a written opinion of the treating cardiologist or electrophysiologist that supports a determination that the mariner is at low risk for future arrhythmia, adverse cardiac event or sudden incapacitation based upon objective testing and standard evaluation tools?

(11) Does the mariner have any other medical conditions which may alone, or in combination with an ICD or anti-tachycardia device, affect the mariner's fitness?

(12) Is the mariner applying for an original credential, raise-in-grade, or renewal of an existing credential?

Authority: We issue this request for public comments under the authority of 5 U.S.C. 552(a).

Dated: August 13, 2012.

P.F. Thomas,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2012–22006 Filed 9–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2012–0131; Notice 1]

RIN 2127–AL16

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This document proposes to increase the maximum civil penalty amounts for violations of motor vehicle safety requirements for the National Traffic and Motor Vehicle Safety Act, as amended, and violations of bumper standards and consumer information provisions. Specifically, this proposes increases in maximum civil penalty amounts for single violations of motor vehicle safety requirements, a series of related violations of school bus and equipment safety requirements, a series of related violations of bumper standards, and a series of related violations of consumer information regarding crashworthiness and damage susceptibility requirements. This action would be taken pursuant to the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, which requires us to review and, as warranted, adjust penalties based on inflation at least every four years.

DATES: Comments on the proposal are due October 9, 2012.

Proposed effective date: 30 days after date of publication of the final rule in the **Federal Register**.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Regardless of how you submit your comments, please note the docket number of this document.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the ''Privacy Act'' heading below.

Privacy Act: Please see the Privacy Act heading under Rulemaking Analyses.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Matthew Weisman, Office of Chief Counsel, NHTSA, telephone (202) 366–5834, facsimile (202) 366–3820, 1200 New Jersey Ave, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Background

In order to preserve the remedial impact of civil penalties and to foster compliance with the law, the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (28 U.S.C. 2461 Notes, Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) (referred to collectively as the ''Adjustment Act'' or,

in context, the ''Act''), requires us and other Federal agencies to adjust civil penalties for inflation. Under the Adjustment Act, following an initial adjustment that was capped by the Act, these agencies must make further adjustments, as warranted, to the amounts of penalties in statutes they administer at least once every four years.

NHTSA's initial adjustment of civil penalties under the Adjustment Act was published on February 4, 1997. 62 FR 5167. At that time, we codified the penalties under statutes administered by NHTSA, as adjusted, in 49 CFR part 578, Civil Penalties. Thereafter, we adjusted certain penalties based on the Adjustment Act and codified others based on other laws including the Transportation Recall Enhancement, Accountability, and Documentation Act.

On May 16, 2006, NHTSA last adjusted the maximum civil penalty for a single violation of the Motor Vehicle Safety Act, sections 30112, 30115, 30117 through 30122, 30123, 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation thereunder, as specified in 49 CFR 578.6(a)(1) from $5,000 to $6,000. 71 FR 28279. At the same time, the agency adjusted the maximum civil penalty for a single violation of the Motor Vehicle Safety Act, section 30166 of Title 49 of the United States Code or a regulation thereunder, to $6,000.

On February 10, 2010, NHTSA last adjusted the maximum civil penalty for a related series of violations of the Motor Vehicle Safety Act as amended involving school buses and school bus equipment, section 30112(a)(1) as it involves school buses and school bus equipment and section 30112(a)(2) of Title 49 of the United States Code, as specified in 49 CFR 578.6(a)(2) from $15,000,000 to $16,650,000. 75 FR 5246.

Also on February 10, 2010, NHTSA last adjusted the maximum civil penalty for a related series of violations of bumper standards, section 32506 of Title 49 of the United States Code, as specified in 49 CFR 578.6(c)(2) from $1,025,000 to $1,175,000. 75 FR 5246. In addition, on February 10, 2010, NHTSA last adjusted the maximum civil penalty for a related series of violations of consumer information requirements regarding crashworthiness and damage susceptibility, section 32308 of Title 49 of the United States Code, as specified in 49 CFR 578.6(d)(1) from $500,000 to $575,000. 75 FR 5246.

We have reviewed the civil penalty amounts in 49 CFR part 578 and propose in this notice to adjust certain penalties under the Adjustment Act.

Method of Calculation—Proposed Adjustments

Under the Adjustment Act, we determine the inflation adjustment for each applicable civil penalty by increasing the maximum civil penalty amount per violation by a cost-of-living adjustment, and then applying a rounding factor. Section 5(b) of the Adjustment Act defines the ''cost-of-living'' adjustment as:

The percentage (if any) for each civil monetary penalty by which—

(1) The Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds

(2) The Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

Since the proposed adjustment is intended to be effective before December 31, 2012, the ''Consumer Price Index [CPI] for the month of June of the calendar year preceding the adjustment'' would be the CPI for June 2011. This figure, based on the Adjustment Act's requirement of using the CPI ''for all-urban consumers published by the Department of Labor'' is 676.162.[1] The penalty amounts that NHTSA proposes to adjust based on the Adjustment Act's requirements were last set in 2006 for a single violation of the Motor Vehicle Safety Act, and in 2010 for a series of related violations of school bus safety requirements, a series of related violations of bumper standards, and a series of related violations of consumer information requirements regarding crashworthiness and damage susceptibility. The CPI figure for June of 2006 is 607.8 and June of 2010 is 652.926

Accordingly, the factors that we are using in calculating the proposed increases are 1.11 (676.162/607.8) for a single Motor Vehicle Safety Act violation and 1.04 (676.162/652.926) for a related series of Motor Vehicle Safety Act violations pertaining to school buses or school bus equipment, as well as for a series of related violations of bumper standards, and a series of related violations of consumer information requirements. Using these inflation factors, calculated increases under these adjustments are then subject to a specific rounding formula set forth in Section 5(a) of the Adjustment Act. 28 U.S.C. 2461, Notes. Under that formula:

Any increase shall be rounded to the nearest:

(1) Multiple of $10 in the case of penalties less than or equal to $100;

(2) Multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) Multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) Multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) Multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) Multiple of $25,000 in the case of penalties greater than $200,000.

Proposed Change to Maximum Penalties Under the Motor Vehicle Safety Act, 49 U.S.C. Chapter 301

Proposed Changes to 49 CFR 578.6(a)(1), (a)(3)

The maximum civil penalty for a violation of any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation prescribed under any of those sections is $6,000, as specified in 49 CFR 578.6(a)(1). The underlying statutory civil penalty provision is 49 U.S.C. 30165(a)(1). Applying the appropriate inflation factor (1.11) to the Adjustment Act calculation raises the $6,000 figure to $6,679, an increase of $679. Under the rounding formula, any increase in a penalty's amount shall be rounded to the nearest multiple of $1,000. In this case, the increase would be $1,000. Accordingly, NHTSA proposes that Section 578.6(a)(1) be amended to increase the maximum civil penalty from $6,000 to $7,000 for each violation.

The maximum civil penalty for a violation of section 30166 of Title 49 of the United States Code or a regulation prescribed under that section is $6,000, as specified in 49 CFR 578.6(a)(3). The underlying statutory civil penalty provision is 49 U.S.C. 30165(a)(3). Applying the appropriate inflation factor (1.11) to the Adjustment Act calculation raises the $6,000 figure to $6,679, an increase of $679. Under the rounding formula, any increase in a penalty's amount shall be rounded to the nearest multiple of $1,000. In this case, the increase would be $1,000. Accordingly, NHTSA proposes that Section 578.6(a)(3) be amended to increase the maximum civil penalty from $6,000 to $7,000 per violation per day.

[1] Individuals interested in deriving the CPI figures used by the agency may visit the Department of Labor's Consumer Price Index Home Page at *http://www.bls.gov/cpi/home.htm.* Scroll down to ''CPI Databases'', ''All Urban Consumers (Current Series)'', and click on ''Top Picks''. Next, select the ''U.S. ALL ITEMS 1967=100—CUUR0000AA0'' box, and click on the ''Retrieve Data'' button.

Proposed Change to 49 CFR 578.6(a)(2)

The maximum civil penalty for a series of related violations of section 30112(a)(1) of Title 49 of the United States Code involving school buses or school bus equipment, or of the prohibition on school system purchases and leases of 15 passenger vans as specified in 30112(a)(2) of Title 49 of the United States Code is $16,650,000, as codified in 49 CFR 578.6(a)(2). The underlying statutory civil penalty provision is 49 U.S.C. 30165(a)(2). Applying the appropriate inflation factor (1.04) to the Adjustment Act calculation raises the $16,650,000 figure to $17,242,531, an increase of $592,531. Applying the rounding rules, which instruct that increases be rounded to the closest $25,000, produces an increase of $600,000. Accordingly, NHTSA proposes that the maximum penalty under Section 578.6(a)(2) be increased to $17,250,000.

Proposed Change to Maximum Penalty Under 49 U.S.C. 32506(a) (49 CFR 578.6(c))

The maximum civil penalty for a series of related violations of bumper prohibitions, section 32506(a) of Title 49 of the United States Code, is $1,175,000 as specified in 49 CFR 578.6(c).

The underlying statutory civil penalty provision is 49 U.S.C. 32507. Applying the appropriate inflation factor (1.04) to the Adjustment Act calculation raises the $1,175,000 figure to $1,216,815, an increase of $41,815. Applying the rounding rules, which instruct that increases be rounded to the closest $25,000, produces an increase of $50,000. Accordingly, NHTSA proposes that the maximum penalty under Section 578.6(c)(2) be increased to $1,225,000.

Proposed Change to Maximum Penalty Under the Consumer Information Provisions (49 CFR 578.6(d)(1))

The maximum civil penalty for a series of related violations of consumer information provisions regarding crashworthiness and damage susceptibility, section 32308(a) of Title 49 of the United States Code, is $575,000 as specified in 49 CFR 578.6(d)(1). Applying the appropriate inflation factor (1.04) to the Adjustment Act calculation raises the $575,000 figure to $595,462, an increase of $20,462. Applying the rounding rules, which instruct that increases be rounded to the closest $25,000, produces an increase of $25,000. Accordingly, NHTSA proposes that the maximum penalty under Section 578.6(a)(d)(1) be increased to $600,000.

Codification of Penalty in the Medium and Heavy Duty Vehicle Fuel Efficiency Program

The Agency's regulations provide that the maximum penalty is $37,500 per vehicle or engine. 49 CFR 535.9(b)(3). Consistent with the approach of codifying the penalties under statutes administered by NHTSA in Part 578, NHTSA will codify this amount in a new subsection (i) of 49 CFR 578.6.

Effective Date

The amendments would be effective 30 days after publication of the final rule in the **Federal Register**. The adjusted penalties would apply to violations occurring on and after the effective date.

Request for Comments

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (49 CFR 553.21). NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments to the docket electronically by logging onto *http://www.regulations.gov* or by the means given in the **ADDRESSES** section at the beginning of this document.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit the following to the Chief Counsel (NCC–110) at the address given at the beginning of this document under the heading **FOR FURTHER INFORMATION CONTACT**: (1) A complete copy of the submission; (2) a redacted copy of the submission with the confidential information removed; and (3) either a second complete copy or those portions of the submission containing the material for which confidential treatment is claimed and any additional information that you deem important to the Chief Counsel's consideration of your confidentiality claim. A request for confidential treatment that complies with 49 CFR part 512 must accompany the complete submission provided to the Chief Counsel. For further information, submitters who plan to request confidential treatment for any portion of their submissions are advised to review 49 CFR part 512, particularly those sections relating to document submission requirements. Failure to adhere to the requirements of Part 512 may result in the release of confidential information to the public docket. In addition, you should submit two copies from which you have deleted the claimed confidential business information, to Docket Management at the address given at the beginning of this document under **ADDRESSES**.

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated at the beginning of this notice under **DATES**. In accordance with our policies, to the extent possible, we will also consider comments that Docket Management receives after the specified comment closing date. If Docket Management receives a comment too late for us to consider in developing the proposed rule, we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address and times given near the beginning of this document under **ADDRESSES**.

You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov/*).

(2) On that page, click on ''search.''

(3) On the next page (*http://dms.dot.gov/search/*), type in the four-digit docket number shown at the heading of this document. Example: if the docket number were ''NHTSA–2006–1234,'' you would type ''1234.''

(4) After typing the docket number, click on ''search.''

(5) The next page contains docket summary information for the docket you selected. Click on the comments you wish to see.

You may download the comments. The comments are imaged documents, in either TIFF or PDF format. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we

recommend that you periodically search the Docket for new material.

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

We have considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866, ''Regulatory Planning and Review.'' This action is limited to the proposed adoption of adjustments of civil penalties under statutes that the agency enforces, and has been determined to be not ''significant'' under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

Regulatory Flexibility Act

We have also considered the impacts of this notice under the Regulatory Flexibility Act. I certify that a final rule based on this proposal will not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The proposed amendments almost entirely potentially affect manufacturers of motor vehicles and motor vehicle equipment.

The Small Business Administration's regulations define a small business in part as a business entity ''which operates primarily within the United States.'' 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification (''SIC'') Codes. SIC Code 336211 ''Motor Vehicle Body Manufacturing'' applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (''NAICS''), Subsector 336—Transportation Equipment Manufacturing, which provides a small business size standard of 1,000 employees or fewer for automobile manufacturing businesses. Other motor vehicle-related industries have lower size requirements that range between 500 and 750 employees.[2]

Many small businesses are subject to the penalty provisions of 49 U.S.C. Chapter 301 (Motor Vehicle Safety Act) and therefore may be affected by the adjustments that this NPRM proposes to make. For example, based on comprehensive reporting pursuant to the early warning reporting (EWR) rule under the Motor Vehicle Safety Act, 49 CFR part 579, of the more than 60 light vehicle manufacturers reporting, over half are small businesses. Also, there are other, relatively low production vehicle manufacturers that are not subject to comprehensive EWR reporting. Furthermore, there are about 70 registered importers. Equipment manufacturers (including importers), entities selling motor vehicles and motor vehicle equipment, and motor vehicle repair businesses are also subject to penalties under 49 U.S.C. 30165.

As noted throughout this preamble, this proposed rule would only increase the maximum penalty amounts that the agency could obtain for a single violation and a related series of violations of various provisions of the Motor Vehicle Safety Act, as well as for a series of related violations of bumper standards, and a series of related violations of consumer information requirements for violations. Under the Motor Vehicle Safety Act, the penalty provision requires the agency to take into account the size of a business when determining the appropriate penalty in an individual case. *See* 49 U.S.C. 30165(b). The agency would also consider the size of a business under its civil penalty policy when determining the appropriate civil penalty amount. *See* 62 FR 37115 (July 10, 1997) (NHTSA's civil penalty policy under the Small Business Regulatory Enforcement Fairness Act (''SBREFA'')). The penalty adjustments that are being proposed would not affect our civil penalty policy under SBREFA.

Since this regulation would not establish penalty amounts, this proposal will not have a significant economic impact on small businesses.

Small organizations and governmental jurisdictions would not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this proposed rule. As explained above, this action is limited to the proposed adoption of a statutory directive, and has been determined to be not ''significant'' under the Department of Transportation's regulatory policies and procedures.

Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this proposed rule would generally apply to motor vehicle and motor vehicle equipment manufacturers (including importers), entities that sell motor vehicles and equipment and motor vehicle repair businesses. It would have very limited applicability to States or local governments, as where they purchase or lease 15 passenger vans used for certain school purposes or activities, which vans do not comply with federal motor vehicle safety standards for school buses and multifunction school activity buses. Thus, the requirements of Section 6 of the Executive Order do not apply.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rule will not have a $100 million effect, no

[2] For example, according to the SBA coding system, businesses that manufacture truck trailers, travel trailers/campers, carburetors, pistons, piston rings, valves, vehicular lighting equipment, motor vehicle seating/interior trim, and motor vehicle stamping qualify as small businesses if they employ 500 or fewer employees. Similarly, businesses that manufacture gasoline engines, engine parts, electrical and electronic equipment (non-vehicle lighting), motor vehicle steering/suspension components (excluding springs), motor vehicle brake systems, transmissions/power train parts, motor vehicle air-conditioning, and all other motor vehicle parts qualify as small businesses if they employ 750 or fewer employees. *See http://www.sba.gov/size/sizetable.pdf* for further details.

Unfunded Mandates assessment will be prepared.

Executive Order 12778 (Civil Justice Reform)

This proposed rule does not have a retroactive or preemptive effect. Judicial review of a rule based on this proposal may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov*.

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Rubber and Rubber Products, Tires, Penalties.

In consideration of the foregoing, 49 CFR part 578 would be amended as set forth below.

1. The authority citation for 49 CFR Part 578 is revised to read as follows:

Authority: Pub. L. 101–410, Pub. L. 104–134, Pub. L. 109–59, 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

2. Section 578.6 is amended by revising paragraphs (a)(1), (a)(2), (a)(3), (c)(2), and (d)(1) and adding a new paragraph (i) to read as follows:

PART 578—CIVIL AND CRIMINAL PENALTIES

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

(a) *Motor vehicle safety*—(1) *In general.* A person who violates any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation prescribed under any of those sections is liable to the United States Government for a civil penalty of not more than $7,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty under this paragraph for a related series of violations is $17,350,000.

(2) *School buses.* (A) Notwithstanding paragraph (a)(1) of this section, a person who:

(i) Violates section 30112(a)(1) of Title 49 United States Code by the manufacture, sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation of a school bus or school bus equipment (as those terms are defined in 49 U.S.C. 30125(a)): or

(ii) violates section 30112(a)(2) of Title 49 United States Code, shall be subject to a civil penalty of not more than $11,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by this section. The maximum penalty under this paragraph for a related series of violations is $17,250,000.

(3) *Section 30166.* A person who violates section 30166 of Title 49 of the United States Code or a regulation prescribed under that section is liable to the United States Government for a civil penalty for failing or refusing to allow or perform an act required under that section or regulation. The maximum penalty under this paragraph is $7,000 per violation per day. The maximum penalty under this paragraph for a related series of daily violations is $17,350,000.

* * * * *

(c) * * *

(2) The maximum civil penalty under this paragraph (c) for a related series of violations is $1,225,000.

(d) *Consumer information—(1) Crash-worthiness and damage susceptibility.* A person that violates 49 U.S.C. 32308(a), regarding crashworthiness and damage susceptibility, is liable to the United States Government for a civil penalty of not more than $1,100 for each violation. Each failure to provide information or comply with a regulation in violation of 49 U.S.C. 32308(a) is a separate violation. The maximum penalty under this paragraph for a related series of violations is $600,000.

* * * * *

(i) *Medium- and heavy-duty vehicle fuel efficiency.* The maximum civil penalty for a violation of the fuel consumption standards of 49 CFR part 535 is not more than $37,500 per vehicle or engine. The maximum civil penalty for a related series of violations shall be determined by multiplying $37,500.00 times the vehicle or engine production volume for the model year in question within the regulatory averaging set.

Issued on: August 30, 2012.

O. Kevin Vincent,

Chief Counsel.

[FR Doc. 2012–22043 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–59–P

Notices

Federal Register
Vol. 77, No. 174
Friday, September 7, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Bridger-Teton Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Bridger-Teton Resource Advisory Committee will meet in Cokeville, Wyoming. The Committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 112–141) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the Committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Title II of the Act. The meeting is open to the public. The purpose of the meeting is to review and recommend projects authorized under Title II of the Act.

DATES: The meeting will be held Monday September 17, 2012 at 6 p.m.

ADDRESSES: The meeting will be held at the Cokeville Town Hall, in the Town Council Conference Room. The Town Hall is located at 110 Pine St, Cokeville WY 83114. Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Greys River Ranger District Office, 671 N Washington St, Afton WY 83110. Please call ahead to 307.886.5300 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Adam Mendonca, Greys River District Ranger, Bridger-Teton National Forest; 307.886.5310 or *amendonca@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Discuss proposed projects. (2) Vote on proposed projects. (3) Public comment. Anyone who would like to bring related matters to the attention of the Committee may file written statements with the Committee staff before the meeting. Written comments must be sent to Greys River Ranger District Office, 671 N Washington St, Afton WY 83110, or by email to *amendonca@fs.fed.us,* or via facsimile to 307.886.5339 by 4:30 p.m. on September 12, 2012. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/Web_Agendas?OpenView&Count=1000&RestrictToCategory=Bridger-Teton* within 21 days of the meeting.

Meeting Accommodations: If you require sign language interpreting, assistive listening devices or other reasonable accommodation please request this in advance of the meeting by contacting the person listed in the section titled For Further Information Contact. All reasonable accommodation requests are managed on a case by case basis.

Dated: August 30, 2012.

Martha Williamson,

Acting Kemmerer District Ranger.

[FR Doc. 2012–22067 Filed 9–6–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Virginia State Technical Guide

AGENCY: Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture.

ACTION: Notice of availability of proposed changes in the Virginia NRCS State Technical Guide for review and comment.

SUMMARY: It has been determined by the NRCS State Conservationist for Virginia that changes must be made in the NRCS State Technical Guide specifically in the following practice standards: Nutrient Management (590) and Feed Management (592). These practices will be used to plan and install conservation practices.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: John A. Bricker, State Conservationist, Natural Resources Conservation Service (NRCS), 1606 Santa Rosa Road, Suite 209, Richmond, Virginia 23229–5014; Telephone number (804) 287–1691 or *jack.bricker@va.usda.gov*

Copies of the practice standards will be made available upon written request to the address shown above or on the Virginia NRCS Web site: *http://www.va.nrcs.usda.gov/technical/draftstandards.html.*

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Virginia will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Virginia regarding disposition of those comments and a final determination of change will be made to the subject standards.

Dated: August 14, 2011.

John A. Bricker,

State Conservationist, Natural Resources Conservation Service, Richmond, Virginia.

[FR Doc. 2012–22079 Filed 9–6–12; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Request for Nominations of Members To Serve on the Federal Economic Scientific Advisory Committee

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Secretary of Commerce is requesting nominations of individuals

to the Federal Economic Scientific Advisory Committee. The Secretary will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides committee and membership criteria.

DATES: Please submit nominations by October 9, 2012.

ADDRESSES: Please submit nominations to B.K. Atrostic, Designated Federal Official for Federal Economic Statistics Advisory Committee, U.S. Census Bureau, Room 2K267, 4600 Silver Hill Road, Washington, DC 20233. Nominations also may be submitted via fax at 301–763–5935, or by email to *barbara.kathryn.atrostic@census.gov.*

FOR FURTHER INFORMATION CONTACT: B.K. Atrostic, Designated Federal Official for Federal Economic Statistics Advisory Committee, U.S. Census Bureau, Room 2K267, 4600 Silver Hill Road, Washington, DC 20233., telephone (301) 763–6442.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act (as amended, Title 5, United States Code, Appendix 2). The following provides information about the committee, membership, and the nomination process:

Objective and Duties

1. The Federal Economic Statistics Advisory Committee (the ''Committee'') is administratively housed at the Economics and Statistics Administration (ESA), U.S. Department of Commerce. The Committee advises Directors of ESA's two statistical agencies, the Bureau of Economic Analysis (BEA) and the Census Bureau (Census), and the Commissioner of the Department of Labor's Bureau of Labor Statistics (BLS) (''the agencies'') on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics.

2. The Committee functions solely as an advisory committee to the senior officials of BEA, Census and BLS in consultation with the Committee chairperson.

3. Important aspects of the Committee's responsibilities include, but are not limited to:

a. Recommending research to address important technical problems arising in federal economic statistics.

b. Identifying areas in which better coordination of the agencies' activities would be beneficial.

c. Establishing relationships with professional associations with an interest in federal economic statistics.

d. Coordinating, in its identification of agenda items, with other existing academic advisory committees chartered to provide agency-specific advice, for the purpose of avoiding duplication of effort.

4. The Committee reports to the Under Secretary for Economic Affairs who, as head of ESA, coordinates and collaborates with the agencies.

Membership

1. The Committee consists of approximately fourteen members who serve at the pleasure of the Secretary of Commerce.

2. Members are nominated by the Department of Commerce, in consultation with the agencies, under the coordination of the Under Secretary for Economic Affairs, and appointed by the Secretary.

3. Committee members are economists, statisticians, survey methodologists, and behavioral scientists, and are chosen to achieve a balanced membership across those disciplines.

4. Members shall be prominent experts in their fields, and recognized for their scientific and professional achievements and objectivity.

a. Members serve as Special Government Employees (SGEs) and are subject to ethics rules applicable to SGEs.

b. Members serve three-year terms. Members may be reappointed to any number of additional three-year terms.

c. Should a committee member be unable to complete a three-year term, a new member may be selected to complete that term for the duration of the time remaining or begin a new term of three years.

d. The agencies, by consensus agreement, shall appoint the chairperson annually from the committee membership. Chairpersons shall be permitted to succeed themselves.

Miscellaneous

1. Members of the Committee will not be compensated for their services, but will be reimbursed for travel expenses upon request.

2. The Committee meets approximately twice a year, budget permitting. Special meetings may be called when appropriate.

Nomination Information

1. Nominations are requested as described above.

2. Nominees must be economists, statisticians, survey methodologists, and behavioral scientists and will be chosen to achieve a balanced membership across those disciplines. Nominees must be prominent experts in their fields, and recognized for their scientific and professional achievements and objectivity. Such knowledge and expertise are needed to advise the agencies on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics.

3. Individuals, groups, and/or organizations may submit nominations on behalf of an individual candidate. A summary of the candidate's qualifications (résumé or curriculum vitae) must be included along with the nomination letter. Nominees must be able to actively participate in the tasks of the Committee, including, but not limited to regular meeting attendance, committee meeting discussant responsibilities, and review of materials, as well as participation in conference calls, webinars, working groups, and special committee activities.

4. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Committee membership.

Dated: August 30, 2012.

Thomas L. Mesenbourg, Jr.,

Acting Director, Bureau of the Census.

[FR Doc. 2012–22106 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to Section 251 of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[08/07/2012 through 08/31/2012]

Firm name	Firm address	Date accepted for investigation	Product(s)
Amrak Enterprises	3515 Airway Drive, Suite 206, Reno, NV 89511–1850.	8/22/2012	The firm manufactures valve components and other machined components and sub-assemblies.
Anderson Cooper and Brass Company, LLC d/b/a Anderson Fittings.	4325 Frontage Road, Oak Forest, IL 60452.	8/27/2012	The firm manufactures brass fittings, connectors, valves and adapters for the trucking, natural gas, and plumbing industries.
Peak Industries, Inc. d/b/a Conestoga Log Cabins & Homes.	246 North Lincoln Avenue, Lebanon, PA 17046.	8/31/2012	The firm manufactures log cabin kits for campgrounds, parks, and others as well as custom log homes.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: August 31, 2012.

Miriam Kearse,

Eligibility Examiner, TAA for Firms.

[FR Doc. 2012–22036 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Meeting of the National Advisory Council on Innovation and Entrepreneurship

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The National Advisory Council on Innovation and Entrepreneurship will hold a meeting on Tuesday, September 11, 2012. The open meeting will be held from 10 a.m.–2 p.m. and will be open to the public via conference call. The meeting will take place at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230. The Council was chartered on November 10, 2009 to advise the Secretary of Commerce on matter related to innovation and entrepreneurship in the United States.

DATES: September 11, 2012.

Time: 10 a.m.–2 p.m. (EST).

ADDRESSES: U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230. Please specify if any specific requests for participation two business days in advance. Last minute requests will be accepted, but may be impossible to complete.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss the latest initiatives by the Administration and the Secretary of Commerce on the issues of innovation, entrepreneurship and commercialization. The meeting will also discuss efforts by the U.S. Department of Commerce around manufacturing, exports and investment. Specific topics for discussion include manufacturing, investment, exports, innovation commercialization, entrepreneurship, federal programs for commercialization and technology transfer. The final agenda will be posted on the U.S. Department of Commerce Web site at *www.commerce.gov*. Any member of the public may submit pertinent questions and comments concerning the Council's affairs at any time before or after the meeting. Comments may be submitted to the Office of Innovation and Entrepreneurship at the contact information below. Copies of the meeting minutes will be available within 90 days.

FOR FURTHER INFORMATION CONTACT: Nish Acharya, Office of Innovation and Entrepreneurship, Room 7019, 1401 Constitution Avenue, Washington, DC 20230; telephone: 202–482–4068; fax: 202–273–4781. Please reference ''NACIE September 11, 2012'' in the subject line of your fax.

Dated: August 30, 2012.

Nish Acharya,

Director, Office of Innovation & Entrepreneurship, U.S. Department of Commerce.

[FR Doc. 2012–21941 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–03–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–34–2012]

Foreign-Trade Zone 45—Portland, OR, Authorization of Production Activity, Shimadzu USA Manufacturing, Inc., (Analytical Instruments—Liquid Chromatographs and Mass Spectrometer Production), Canby, OR

The Port of Portland, grantee of FTZ 45, submitted a notification of proposed production activity within Subzone 45G, at the facility of Shimadzu USA Manufacturing, Inc. (Shimadzu), located in Canby, Oregon. Subzone status was approved for Shimadzu's Canby facility on August 8, 2012 (S–52–2012, 77 FR 48127, 8/13/2012).

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (77 FR 28353, 5/14/2012). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: August 30, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–22117 Filed 9–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1855]

Reorganization of Foreign-Trade Zone 151 Under Alternative Site Framework Findlay, Ohio

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-

Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of zones;

Whereas, the Findlay/Hancock County Chamber of Commerce, grantee of Foreign-Trade Zone 151, submitted an application to the Board (FTZ Docket 20–2012, filed 3/20/2012) for authority to reorganize under the ASF with a service area of Hardin, Putnam, Seneca, Allen and Hancock Counties, Ohio, adjacent to the Toledo Customs and Border Protection port of entry, and FTZ 151's existing Sites 1 and 3 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (77 FR 17408–17409, 3/26/2012) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 151 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Site 3 if not activated by August 31, 2017.

Signed at Washington, DC, this 29th day of August 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–22114 Filed 9–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 120822382–2382–01]

Effectiveness of Licensing Procedures for Agricultural Commodities to Cuba

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Request for comments.

SUMMARY: The Bureau of Industry and Security (BIS) is requesting public comments on the effectiveness of its licensing procedures as defined in the Export Administration Regulations for the export of agricultural commodities to Cuba. BIS will include a description of these comments in its biennial report to the Congress, as required by the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7201 *et seq.*), as amended.

DATES: Comments must be received by October 9, 2012.

ADDRESSES: Comments may be submitted to the Federal eRulemaking portal (*www.regulations.gov*). The regulations.gov ID is: BIS–2012–0039. Comments may also be sent by email to *publiccomments@bis.doc.gov* with a reference to ''TSRA 2012 Report'' in the subject line. Written comments may be submitted by mail to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, Washington, DC 20230 with a reference to ''TSRA 2012 Report.'' All comments must be in writing (either submitted to regulations.gov, by email or on paper).

FOR FURTHER INFORMATION CONTACT: Tracy L. Patts, Office of Nonproliferation and Treaty Compliance, Telephone: (202) 482–4252. Additional information on BIS procedures and our previous biennial report under the Trade Sanctions Reform and Export Enhancement Act, as amended, is available at *www.bis.doc.gov/licensing/TSRA_TOC.html.* Copies of these materials may also be requested by contacting the Office of Nonproliferation and Treaty Compliance.

SUPPLEMENTARY INFORMATION: Pursuant to section 906(a) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (22 U.S.C. 7205(a)), the Bureau of Industry and Security (BIS) authorizes exports of agricultural commodities, as defined in part 772 of the Export Administration Regulations (EAR), to Cuba. Requirements and procedures associated with such authorization are set forth in § 740.18 of the EAR (15 CFR 740.18). These are the only licensing procedures in the EAR currently in effect pursuant to the requirements of section 906(a) of TSRA.

Under the provisions of section 906(c) of TSRA (22 U.S.C. 7205(c)), BIS must submit a biennial report to the Congress on the operation of the licensing system implemented pursuant to section 906(a) for the preceding two-year period. This report must include the number and types of licenses applied for, the number and types of licenses approved, the average amount of time elapsed from the date of filing of a license application until the date of its approval, the extent to which the licensing procedures were effectively implemented, and a description of comments received from interested parties during a 30-day public comment period about the effectiveness of the licensing procedures. BIS is currently preparing a biennial report on the operation of the licensing system for the two-year period from October 1, 2010 through September 30, 2012.

Request for Comments

By this notice, BIS requests public comments on the effectiveness of the licensing procedures for the export of agricultural commodities to Cuba set forth under § 740.18 of the EAR. Parties submitting comments are asked to be as specific as possible. All comments received by the close of the comment period will be considered by BIS in developing the report to Congress.

All comments must be in writing and will be available for public inspection and copying. Any information that the commenter does not wish to be made available to the public should not be submitted to BIS.

Dated: August 27, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–21523 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 120816348–2348–01]

Effects of Foreign Policy-Based Export Controls

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Request for comments.

SUMMARY: In developing its report to Congress, BIS is seeking public comments on the effect of existing foreign policy-based export controls in the Export Administration Regulations. BIS is requesting public comments to conduct consultations with U.S. industries. Section 6 of the Export Administration Act (EAA) requires BIS to consult with industry on the effect of such controls and to report the results of the consultations to Congress. Comments from all interested persons are welcome. All comments will be made available for public inspection

and copying and included in a report to be submitted to Congress.

DATES: Comments must be received by October 9, 2012.

ADDRESSES: Comments on this rule may be submitted to the Federal e-Rulemaking portal (*www.regulations.gov*). The regulations.gov ID for this rule is: BIS–2012–0038. Comments may also be sent by email to *publiccomments@bis.doc.gov* or on paper to Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th Street & Pennsylvania Avenue NW., Room 2099B, Washington, DC 20230. Include the phrase ''FPBEC Comment'' in the subject line of the email message or on the envelope if submitting comments on paper. All comments must be in writing (either submitted to regulations.gov, by email or on paper). All comments, including Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter will be a matter of public record and will be available for public inspection and copying. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Foreign Policy Division, Office of Nonproliferation Controls and Treaty Compliance, Bureau of Industry and Security, telephone 202–482–4252. Copies of the current Annual Foreign Policy Report to the Congress are available at *http://www.bis.doc.gov/news/2012/2012_fpreport.pdf* and copies may also be requested by calling the Office of Nonproliferation and Treaty Compliance at the number listed above.

SUPPLEMENTARY INFORMATION:

Background

Foreign policy-based controls in the Export Administration Regulations (EAR) are implemented pursuant to section 6 of the Export Administration Act of 1979, as amended, (50 U.S.C. app. sections 2401–2420 (2000)) (EAA). The current foreign policy-based export controls maintained by the Bureau of Industry and Security (BIS) are set forth in the EAR (15 CFR parts 730–774), including in parts 742 (CCL Based Controls), 744 (End-User and End-Use Based Controls) and 746 (Embargoes and Other Special Controls). These controls apply to a range of countries, items, activities and persons, including:

- Entities acting contrary to the national security or foreign policy interests of the United States (§ 744.11);
- Certain general purpose microprocessors for ''military end-uses'' and ''military end-users'' (§ 744.17);
- Significant items (SI);
- Hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems (§ 742.14);
- Encryption items (§ 742.15);
- Crime control and detection items (§ 742.7);
- Specially designed implements of torture (§ 742.11);
- Certain firearms and related items based on the Organization of American States Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Munitions included within the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (§ 742.17);
- Regional stability items (§ 742.6);
- Equipment and related technical data used in the design, development, production, or use of certain rocket systems and unmanned air vehicles (§§ 742.5 and 744.3);
- Chemical precursors and biological agents, associated equipment, technical data, and software related to the production of chemical and biological agents (§§ 742.2 and 744.4) and various chemicals included on the list of those chemicals controlled pursuant to the Chemical Weapons Convention (§ 742.18);
- Communication intercepting devices, software and technology (§ 742.13);
- Nuclear propulsion (§ 744.5);
- Aircraft and vessels (§ 744.7);
- Restrictions on exports and reexports to certain persons designated as proliferators of weapons of mass destruction (§ 744.8);
- Certain cameras to be used by military end-users or incorporated into a military commodity (§ 744.9);
- Countries designated as Supporters of Acts of International Terrorism (§§ 742.8, 742.9, 742.10, 742.19, 746.2, 746.4, 746.7, and 746.9);
- Certain entities in Russia (§ 744.10);
- Individual terrorists and terrorist organizations (§§ 744.12, 744.13 and 744.14);
- Certain persons designated by Executive Order 13315 (''Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members'') (§ 744.18);
- Certain sanctioned entities (§ 744.20); and
- Embargoed countries (Part 746).

In addition, the EAR impose foreign policy-based export controls on certain nuclear-related commodities, technology, end-uses and end-users (§§ 742.3 and 744.2), in part, implementing section 309(c) of the Nuclear Non Proliferation Act (42 U.S.C. 2139a).

Request for Comments

Under the provisions of section 6 of the EAA, export controls maintained for foreign policy purposes require annual extension. Section 6 of the EAA requires a report to Congress when foreign policy-based export controls are extended. The EAA expired on August 20, 2001. Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2012 (77 FR 49699 (Aug. 16, 2012)), continues the EAR and, to the extent permitted by law, the provisions of the EAA, in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)). The Department of Commerce, as appropriate, follows the provisions of section 6 of the EAA by reviewing its foreign policy-based export controls, conducting consultations with industry through public comments on such controls, and preparing a report to be submitted to Congress. In January 2012, the Secretary of Commerce, on the recommendation of the Secretary of State, extended for one year all foreign policy-based export controls then in effect. BIS is now soliciting public comment on the effects of extending the existing foreign policy-based export controls from January 2013 to January 2014. Among the criteria considered in determining whether to extend U.S. foreign policy-based export controls are the following:

1. The likelihood that such controls will achieve their intended foreign policy purposes, in light of other factors, including the availability from other countries of the goods, software or technology proposed for such controls;

2. Whether the foreign policy objective of such controls can be achieved through negotiations or other alternative means;

3. The compatibility of the controls with the foreign policy objectives of the United States and with overall U.S. policy toward the country subject to the controls;

4. Whether the reaction of other countries to the extension of such controls is not likely to render the controls ineffective in achieving the intended foreign policy objective or be counterproductive to U.S. foreign policy interests;

5. The comparative benefits to U.S. foreign policy objectives versus the effect of the controls on the export performance of the United States, the competitive position of the United

States in the international economy, the international reputation of the United States as a supplier of goods and technology; and

6. The ability of the United States to effectively enforce the controls.

BIS is particularly interested in receiving comments on the economic impact of proliferation controls. BIS is also interested in industry information relating to the following:

1. Information on the effect of foreign policy-based export controls on sales of U.S. products to third countries (*i.e.,* those countries not targeted by sanctions), including the views of foreign purchasers or prospective customers regarding U.S. foreign policy-based export controls.

2. Information on controls maintained by U.S. trade partners. For example, to what extent do U.S. trade partners have similar controls on goods and technology on a worldwide basis or to specific destinations?

3. Information on licensing policies or practices by our foreign trade partners that are similar to U.S. foreign policy based export controls, including license review criteria, use of conditions, and requirements for pre- and post-shipment verifications (preferably supported by examples of approvals, denials and foreign regulations).

4. Suggestions for bringing foreign policy-based export controls more into line with multilateral practice.

5. Comments or suggestions to make multilateral controls more effective.

6. Information that illustrates the effect of foreign policy-based export controls on trade or acquisitions by intended targets of the controls.

7. Data or other information on the effect of foreign policy-based export controls on overall trade at the level of individual industrial sectors.

8. Suggestions for measuring the effect of foreign policy-based export controls on trade.

9. Information on the use of foreign policy-based export controls on targeted countries, entities, or individuals. BIS is also interested in comments relating generally to the extension or revision of existing foreign policy-based export controls.

Parties submitting comments are asked to be as specific as possible. All comments received before the close of the comment period will be considered by BIS in reviewing the controls and in developing the report to Congress. All comments received in response to this notice will be displayed on BIS's Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia* and on the Federal e-Rulemaking portal at *www.Regulations.gov*. All comments will also be included in a report to Congress, as required by section 6 of the EAA, which directs that BIS report to Congress the results of its consultations with industry on the effects of foreign policy-based controls.

Dated: August 27, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–21571 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before September 27, 2012. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5:00 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 12–034. *Applicant:* Stony Brook University, 100 Nicolls Rd., Stony Brook, NY 11794. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* The instrument will be used to study the morphology and crystalline structure of metallic, semi-conductor, or polymeric materials. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 11, 2012.

Docket Number: 12–035. *Applicant:* The City College of New York, Office of the Dean of Science, Marshak 1320, 160 Convent Ave., New York, NY 10031. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* The instrument will be used for several projects including the examination of the distribution of intracellular proteins that mediate the ligand-mediated chemotaxis of cells within a micro-controlled environment, the study of nanoparticles, and the structure of influenza vaccine strains. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 30, 2012.

Dated: August 30, 2012.

Callie H. Conroy,

Acting Director of Subsidies Enforcement, Import Administration.

[FR Doc. 2012–22113 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

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Docket Number: 12–035. *Applicant:* The City College of New York, Office of the Dean of Science, Marshak 1320 160 Convent Ave., New York, NY 10031. *Instrument:* Electron Microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* The instrument will be used for several projects including the examination of the distribution of intracellular proteins that mediate the ligand-mediated chemotaxis of cells within a micro-controlled environment,

the study of nanoparticles, and the structure of influenza vaccine strains. *Justification for Duty-Free Entry:* There are no instruments of the same general category manufactured in the United States. *Application accepted by Commissioner of Customs:* July 30, 2012.

Dated: August 31, 2012.

Callie H. Conroy,

Acting Director of Subsidies Enforcement, Import Administration.

[FR Doc. 2012–22111 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Executive-Led Indonesia Vietnam Infrastructure Business Development Mission Statement—Clarification and Amendment

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service (CS) is publishing this supplement to the Notice of the Executive-Led Indonesia Vietnam Infrastructure Business Development Mission Statement, 77 FR, No. 131, July 9, 2012, to amend the Notice to revise the dates of the application deadline from August 31, 2012 to the new deadline of September 21, 2012.

SUPPLEMENTARY INFORMATION: Amendments to Revise the Dates and Provide for Selection of Applicants on a Rolling Basis:

Background

Recruitment for this Mission began in July 2012. Due to summer holidays, it has been determined that an additional time is needed to allow for additional recruitment and marketing in support of the mission. Applications will now be accepted through September 21, 2012 (and after that date if space remains and scheduling constraints permit), interested U.S. infrastructure firms and trade organizations which have not already submitted an application are encouraged to do so.

Amendments

1. For the reasons stated above, the *Timeframe for Recruitment and Applications* section of the Notice of the Indonesia Vietnam Infrastructure Business Development Mission Statement, 77 FR, No. 131, July 9, 2012, is amended to read as follows:

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions*) and other Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for this mission will conclude no later than September 21, 2012. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis beginning August 31, 2011. We will inform all applicants of selection decisions no later than October 5, 2012. Applications received after the September 21, 2012 deadline will be considered only if space and scheduling constraints permit.

FOR FURTHER INFORMATION CONTACT: Jennifer Andberg, Office of Business Liaison, Phone: 202–482–1360; Fax: 202–482–4054, Email: *businessliaison@doc.gov*.

Elnora Moye,

Trade Program Assistant.

[FR Doc. 2012–22007 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–836]

Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests for an administrative review by two respondent parties, Maquilacero S.A. de C.V. (Maquilacero) and Regiomontana de Perfiles y Tubos S.A. de C.V. (Regiopytsa), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on light-walled rectangular pipe and tube (LWR pipe and tube) from Mexico. For these preliminary results, we have found that neither company sold subject merchandise at less than normal value during the period of review, which covers August 1, 2010, through July 31, 2011. If these preliminary results are adopted in our final results of administrative review, we will issue appropriate assessment instructions to U.S. Customs and Border Protection (CBP).

DATES: *Effective Date:* September 7, 2012.

FOR FURTHER INFORMATION CONTACT: Dena Crossland (Maquilacero) or Edythe Artman (Regiopytsa), AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3362 or (202) 482–3931, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published a notice of opportunity to request an administrative review of the order on LWR pipe and tube from Mexico on August 1, 2011.[1] Two respondents, Maquilacero and Regiopytsa, requested a review of their own entries of subject merchandise for the period of review. Hence, the Department published a notice of initiation of the review on October 3, 2011.[2]

Both Maquilacero and Regiopytsa submitted responses to the Department's antidumping questionnaire and responses to subsequent requests for additional information. The petitioner filed no comments on these responses.

Extension of Preliminary Results

On May 10, 2012, the Department published a notice extending the time limit for issuing the preliminary results of review by 120 days.[3] The extension notice established the deadline of August 30, 2012, for these preliminary results.

Period of Review

The period of review is August 1, 2010, through July 31, 2011.

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 45773 (August 1, 2011).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 76 FR 61076 (October 3, 2011).

[3] *See Light-Walled Rectangular Pipe and Tube from Mexico; Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 77 FR 27424 (May 10, 2012).

Scope of the Order

The merchandise that is the subject of the order is certain welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.

The term carbon-quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon-quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium. The description of carbon-quality is intended to identify carbon-quality products within the scope. The welded carbon-quality rectangular pipe and tube subject to the order is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Affiliated Respondents

Under section 771(33)(E) of the Tariff Act of 1930, as amended (the Act), if one party owns, directly or indirectly, five percent or more of another party, such parties are considered to be affiliated for purposes of the antidumping law. Furthermore, pursuant to 19 CFR 351.403, the Department may require a respondent to report the downstream sales of its affiliated customer to the first unaffiliated customer if: (1) The respondent's sales to all affiliated customers account for five percent or more of the respondent's total sales of foreign-like product in the comparison market, and (2) those sales to the affiliated customer are determined to have not been made at arm's-length.

In past segments of this proceeding, the Department found that Maquilacero should report the downstream sales of an affiliated home-market customer pursuant to section 771(33)(E) of the Act.[4] But, although Maquilacero reported its sales to the affiliated reseller to constitute more than five-percent of Maquilacero's total home-market sales during the period of the current review, we also found that the sales were made at arm's-length and, thus, we did not request that Maquilacero submit its affiliate's downstream sales.

Regiopytsa also reported sales to an affiliated home-market reseller during the period of review but, as the value of the sales constituted less than five percent of Regiopytsa's total home-market sales during the period, we did not request that Regiopytsa report the downstream sales of this affiliate.

Fair Value Comparisons

To determine if sales of subject merchandise were made in the United States at less than fair value (LTFV), we compared the price of U.S. sales to normal value, as described in the ''U.S. Price'' and ''Normal Value'' sections of this notice. For these preliminary results, the Department applied the methodology for calculation of a weighted-average dumping margin recently adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*). In particular, we compared monthly weighted-average U.S. prices with monthly weighted-average normal values and granted offsets for any non-dumped comparisons in the calculation of the weighted-average dumping margin.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products covered by the description in the ''Scope of the Order'' section above and that were produced by Maquilacero and Regiopytsa and sold in the home market during the period of review, to be foreign like product for purposes of determining appropriate product comparisons to subject merchandise sold in the United States. We relied on the following six product characteristics to identify identical subject merchandise and foreign like product: (1) Steel input type; (2) whether the product was metallic-coated or not; (3) whether the product was painted or not; (4) product perimeter; (5) wall thickness; and (6) shape. Where there were no sales of identical merchandise in the home market to compare to subject merchandise sold in the United States, we compared the U.S. sales to home-market sales of the most-similar, foreign like product on the basis of the reported product characteristics and instructions provided in our antidumping questionnaire.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act and to the extent practicable, we determine normal value based on sales made in the home market at the same level of trade as the export price or the constructed export price. The normal-value level of trade is based on the starting prices of sales in the home market or, when normal value is based on constructed value, those of the sales from which we derived selling, general, and administrative expenses and profit. *See also* 19 CFR 351.412(c)(1)(iii). For export price, the level of trade is based on the starting price, which is usually the price from the exporter to the importer. *See* 19 CFR 351.412(c)(1)(i). In this review, both Maquilacero and Regiopytsa reported only export-price sales to the United States.

To determine if home-market sales are made at a different level of trade than export-price sales, we examine stages in the marketing process and the selling functions performed along the chain of distribution between the producer and the unaffiliated customer. *See* 19 CFR 351.412(c)(2). If home-market sales are at a different level of trade, as manifested in a pattern of consistent price differences between the sales on which normal value is based and home-market sales made at the level of trade of the export transaction and this difference affects price comparability, then we make a level-of-trade adjustment to normal value under section 773(a)(7)(A) of the Act and 19 CFR 351.412.[5]

Maquilacero

In response to section A of the antidumping questionnaire and in supplemental responses to the questionnaire, Maquilacero reported one level of trade with one channel of distribution for its export-price sales. Based on our analysis of the selling functions performed by Maquilacero on its sales to the United States, we

[4] *See, e.g., Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55559 (September 13, 2010), unchanged in *Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review,* 76 FR 9547 (February 18, 2011).

[5] *See, e.g., Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 77 FR 32531 (June 1, 2012), citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731 (November 19, 1997).

determined that the sales were made at one level of trade.

For the home market, Maquilacero identified two channels of distribution in its section A response as follows: (1) Direct sales made by Maquilacero, and (2) indirect sales made by its affiliated reseller to the first unaffiliated customer. Maquilacero reported that the sales in both channels were made at one level of trade. Based on our analysis of all of Maquilacero's home-market selling functions, we found that the sales made in both channels of distribution were made at one level of trade, the normal-value level of trade.

We then compared the selling functions performed for the sales at the normal-value level of trade to those performed for sales at the export-price level of trade. Based on this analysis, we preliminarily determined that the starting price of Maquilacero's home-market sales and its export price represented different stages in the marketing process and were thus at different levels of trade. However, because Maquilacero only sold at one level of trade in the home market, there is no basis on which to determine if there was a pattern of consistent price differences between two levels of trade in that market. Furthermore, there is no other record evidence on which to base a level-of-trade adjustment. Therefore, although the normal-value level of trade differed from the export-price level of trade, we are unable to make a level-of-trade adjustment to normal value for Maquilacero.[6]

Regiopytsa

In its initial and supplemental responses to section A, Regiopytsa reported one channel of distribution for its home-market sales made to two types of customers (*i.e.,* distributors and end-users). For all sales made through the affiliated reseller in the home market, Regiopytsa reported that the merchandise was resold to unaffiliated customers. Regiopytsa reported a single level of trade in its home market sales database. Based on our analysis of Regiopytsa's home-market selling functions, we preliminary found that the selling functions for the reported channel of distribution constituted one level of trade in the home market, or the normal-value level of trade.

In the U.S. market, Regiopytsa reported one level of trade for which there was one channel of distribution to two types of customers (*i.e.,* distributors and steel service centers). It reported a single level of trade in its U.S. sales database. Based on our analysis of the selling functions Regiopytsa performed for its export-price sales, we determined that there was one level of trade for its U.S. sales.

Next we compared the selling functions associated with the sales at the normal-value level of trade to those associated with the export-price level of trade and, based on our analysis of record evidence, we found that the degree and number of selling functions provided by Regiopytsa for its customers in the home market was greater than the degree to which it provided some of those selling functions to U.S. customers. However, as with Maquilacero, we were unable to calculate a level-of-trade adjustment because we found only one level of trade in Regiopytsa's home market and there is no other record evidence on which to base an adjustment. Therefore, for these preliminary results, we matched the export-price sales to home-market sales without making a level-of-trade adjustment to normal value.[7]

Date of Sale

The Department will normally use invoice date, as recorded in the exporter's or producer's records kept in the ordinary course of business, as the date of sale, but may use a date other than the invoice date if it better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i). For Maquilacero and Regiopytsa, we found that the invoice date best reflected the date on which material terms of sales were established with one exception. Regiopytsa reported that it had some home-market sales for which the invoice and shipment dates did not coincide. Based on our analysis of the factual circumstances of these sales, we found that the material terms of sale were in fact subject to change up until the time the merchandise was released for shipment. Thus, for these preliminary results, we determined that the most appropriate date of sale for these sales was the date of shipment, as discussed in the ''Date of Sale'' section of Regiopytsa Preliminary Analysis Memo at 5.

U.S. Price

Section 772(a) of the Act defines export price as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).''

For purposes of these preliminary results, we calculated the U.S. price as the export price for Maquilacero and Regiopytsa in accordance with section 772(a) of the Act, because the merchandise was sold, prior to importation by the producer, outside of the United States to the first unaffiliated purchaser in the United States. For each company, we calculated export price based on the packed price that was charged to the first unaffiliated U.S. customer. We made deductions for movement expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act, including deductions for foreign inland freight (plant/warehouse to the border), U.S. inland freight (border to the unaffiliated customer), country of manufacture inland insurance, and brokerage and handling. We also made adjustments, where appropriate, for imputed credit, certain direct selling expenses (including commissions), and billing adjustments.

Normal Value

A. Selection of Home Market

To determine if there was a sufficient volume of sales of LWR pipe and tube in the home market during the period of review to serve as a viable basis for calculating normal value, we compared Maquilacero and Regiopytsa's quantity of home-market sales of the foreign like product to the quantity of each company's respective U.S. sales of the subject merchandise, in accordance with section 773(a) of the Act. Because both Maquilacero and Regiopytsa's aggregate quantity of home-market sales of the foreign like product was greater than five percent of their aggregate quantity of U.S. sales for subject merchandise, we determined that the home market was viable for comparison purposes for both companies, pursuant to section 773(a)(1)(B) of the Act.

B. Affiliated Party Transactions and Arm's-Length Test

Sales to affiliated customers in the home market that were not made at

[6] For a more detailed discussion of this analysis, *see* the ''Level of Trade'' section in the Memorandum to the File for ''Analysis of Data Submitted by Maquilacero S.A. de C.V. (Maquilacero) for the Preliminary Results of the Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube (LWR pipe and tube) from Mexico,'' dated August 30, 2012 (Maquilacero Preliminary Analysis Memo), at 3 and 4.

[7] *See* section 773(a)(7)(A) of the Act. For further discussion of this analysis, *see* the ''Level of Trade'' section in the Memorandum to the File for ''Analysis of Data Submitted by Regiomontana de Perfiles y Tubos S.A. de C.V. for the Preliminary Results of the Antidumping Duty Administrative Review on Light-Walled Rectangular Pipe and Tube from Mexico,'' dated August 30, 2012 (Regiopytsa Preliminary Analysis Memo), at 3 and 4.

arm's-length prices were excluded from our analysis because we consider them to be outside the ordinary course of trade. *See* section 773(f)(2) of the Act; *see also* 19 CFR 351.102(b). Consistent with 19 CFR 351.403(c) and (d) and agency practice, ''the Department may calculate normal value based on sales to affiliates if satisfied that the transactions were made at arm's-length.'' *See China Steel Corp.* v. *United States,* 264 F. Supp. 2d 1339, 1365 (CIT 2003). To test whether the sales to affiliates were made at arm's-length prices, we compared, on a model-specific basis, the starting prices of sales to affiliated and unaffiliated customers, net of all direct selling expenses, billing adjustments, discounts, rebates, movement charges and packing. Where prices to the affiliated party were, on average, within a range of 98 to 102 percent of the price of identical or comparable merchandise to the unaffiliated parties, we determined that the sales made to the affiliated party were at arm's-length. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade,* 67 FR 69186, 69194 (November 15, 2002). Based on this analysis, Maquilacero's sales through its affiliated reseller were made at arm's length but those made by Regiopytsa through its affiliated reseller and to other affiliated customers were not. Therefore, in our margin calculations, we included Maquilacero's sales to its affiliate but excluded Regiopytsa's sales to its affiliates.

C. Cost of Production Analysis

Both respondents have had home-market sales disregarded in prior reviews on the basis that they had sales priced below the cost of production (COP), which were made within an extended period of time, in substantial quantities, and at prices which permitted the recovery of all costs within a reasonable period of time.[8] Thus, pursuant to section 773(b)(2)(A)(ii) of the Act, there were reasonable grounds in the current review to believe or suspect that Maquilacero and Regiopytsa had made sales of the foreign like product at prices below the COP. On October 14, 2011, we therefore requested that both parties provide cost information in response to section D of the Department's antidumping questionnaire.

Based on a review of the cost information provided, neither company appeared to experience significant changes in its cost of manufacturing (COM) throughout the period of review. Thus, we followed our normal methodology of calculating a review-period, weighted-average cost for each product. We relied on the COP information provided by Maquilacero and Regiopytsa except, in accordance with section 773(f)(2) of the Act, we made an adjustment to Maquilacero's affiliated-party-supplied labor costs to reflect the higher of the transfer price or COP. Because the record did not provide market prices for these services in the market under consideration, we used the COP of the affiliate as a proxy for the amount representing the value of labor costs usually reflected in the market under consideration.[9]

On a product-specific basis, we compared the adjusted, weighted-average COP figures to the prices of home-market sales of the foreign like product in order to determine if these sales were made at prices below the COP. The prices were exclusive of any applicable movement charges, packing expenses, warranty expenses, or indirect selling expenses. In determining whether to disregard home-market sales made at prices below their COP, we examined if such sales were made within an extended period of time, in substantial quantities, and at prices which permitted the recovery of all costs within a reasonable period of time.

We found that, for certain products for Maquilacero and Regiopytsa, more than 20 percent of the home-market sales were made at prices below the COP and that these below-cost sales were made within an extended period of time and in substantial quantities. In addition, the sales were made at prices that did not permit the recovery of costs within a reasonable period of time. Thus, for both Maquilacero and Regiopytsa, in accordance with section 773(b)(1) of the Act, we disregarded these below-cost sales, and used only the remaining sales of the same product as the basis for determining normal value.

D. Price-to-Price Comparisons

We calculated the weighted-average normal value based on prices to unaffiliated customers and those to affiliated customers that passed the arm's-length test.[10] We also based normal value on home-market sales that passed the cost test. In our calculation of normal value, we accounted for billing adjustments, discounts, and rebates, where appropriate. We also made deductions, where applicable, for inland freight, insurance, handling, and warehousing, pursuant to section 773(a)(6)(B) of the Act. We also made adjustments for differences in circumstances of sale, in accordance with section 773(a)(6)(C)(iii) of the Act. In particular, we made circumstances-of-sale adjustments for home-market direct selling expenses, such as imputed credit expenses and warranty expenses, and certain U.S. direct selling expenses, including commissions and warranty expenses. For Maquilacero, we calculated home-market and U.S. warranty expenses based on a three-year history of such expenses. *See* Maquilacero Preliminary Analysis Memo at 4 and 5. For Regiopytsa, we calculated U.S. warranty expenses based on a three-year history of such expenses but, because the company does not track warranty expenses in its normal course of business, it was unable to provide a history of these expenses for its home market. Regiopytsa did include refunds granted for merchandise in its reported home-market billing adjustments. Finally, we deducted home-market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

For more detailed information on the calculation of normal value, *see* Maquilacero Preliminary Analysis Memo at 9 and 10 and Regiopytsa Preliminary Analysis Memo at 9 and 10.

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank.[11] However, we note that

[8] At the beginning of this review, sales for both Maquilacero and Regiopytsa had been most recently disregarded in the 2008/2009 administrative review, as discussed in *Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55559, 55565–55566 (September 13, 2010), unchanged in *Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review,* 76 FR 9547 (February 18, 2011).

[9] For further details regarding this adjustment for Maquilacero, *see* the Memorandum to Neal M. Halper, Director, Office of Accounting, from Frederick W. Mines, Accountant, regarding the ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Maquilacero S.A. de C.V.'', dated August 30, 2012.

[10] We excluded home-market sales of secondary merchandise, for which neither Maquilacero nor Regiopytsa could provide complete product characteristic information and which both companies reported to be heavily discounted lot sales (*i.e.,* sales of assorted merchandise), from our margin-calculation analysis. For a more detailed discussion of these sales, *see* Maquilacero Preliminary Analysis Memo at 5 and 6 and Regiopytsa Preliminary Analysis Memo at 6 and 7.

[11] *See Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France,* 68 FR 47049, 47055 (August 7, 2003), unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France,* 68 FR 69379 (December 12, 2003).

the Federal Reserve Bank does not track or publish exchange rates for the Mexican peso. Therefore, pursuant to section 773A(a) of the Act, we made currency conversions from Mexican pesos to U.S. dollars based on the daily exchange rates from Factiva, a Dow Jones & Reuters Retrieval Service. Because Factiva only publishes exchange rates for Monday through Friday, we used the rate of exchange on the most recent Friday for conversion of dates involving a Saturday or Sunday. *See* Import Administration Web site at *http://ia.ita.doc.gov/exchange/index.html.*

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margins exist for the period August 1, 2010, through July 31, 2011:

Manufacturer/exporter	Weighted-average dumping margin
Maquilacero S.A. de C.V.	0.00%
Regiomontana de Perfiles y Tubos S.A. de C.V.	0.00%

Disclosure and Public Comments

The Department will disclose the calculations we used in our analysis to interested parties to this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c). Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the time limit for submitting the case briefs. *See* 19 CFR 351.309(d). Parties who submit argument in these proceedings are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Parties are reminded that any requests or other submissions must be filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System, in compliance with the procedures set forth in *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). An electronically-filed document must be received successfully in its entirety by 5 p.m. Eastern Time (ET) on the day of its filing.

The Department intends to issue the final results of this administrative review, including the results of our analysis of the issues in any such argument or at a hearing, within 120 days of the date of publication of this notice. *See* section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of this administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. If either Maquilacero's or Regiopytsa's weighted-average dumping margin is above *de minimis* in the final results of this review, we will calculate importer- or customer-specific *ad valorem* assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the importer's or customer's examined sales made during the period of review to the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). *See Final Modification for Reviews,* 77 FR at 8103. Where the duty assessment rates are above *de minimis,* we will instruct CBP to assess duties on all entries of subject merchandise by that importer in accordance with the requirements set forth in 19 CFR 351.106(c)(2).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the period of review that were produced by the companies included in these preliminary results of review and for which the reviewed companies did not know that the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un-reviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

In accordance with 19 CFR 356.8(a), the Department intends to issue assessment instructions to CBP on or after 41 days following the publication of the final results of this review.

Cash Deposit Requirements

The following cash-deposit requirements will be effective, upon completion of the final results of this administrative review, for all shipments of LWR pipe and tube from Mexico entered or withdrawn from warehouse, for consumption, on or after the date of publication of the final results of review, as provided by section 751(a)(1) of the Act: (1) The cash-deposit rates for the companies covered by this review (*i.e.,* Maquilacero and Regiopytsa) will be the rates established in the final results of this review, except if the rate is less than 0.50 percent (*de minimis* within the meaning of 19 CFR 351.106(c)(1)), in which case the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a previous review, or the LTFV investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash-deposit rate will be the all-others rate of 3.76 percent, as established in the LTFV investigation.[12] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of

[12] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403, 45405 (August 5, 2008).

antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 30, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–22109 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC008

Endangered and Threatened Species; Recovery Plans

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; reopening of public comment period.

SUMMARY: We, NMFS, published a notice on May 16, 2012, announcing that the Proposed Endangered Species Act (ESA) Recovery Plan for Lower Columbia River Chinook Salmon, Lower Columbia River Coho Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead (Proposed Plan) was available for public review and comment. Comments were due by July 16, 2012. We have decided to reopen the public comment period for an additional 30 days.

DATES: We will consider and address, as appropriate, all substantive comments received during this reopened comment period. Comments received during the previous comment period will also be considered and need not be resubmitted. New comments must be received no later than 5 p.m. Pacific daylight time on October 9, 2012.

ADDRESSES: Please send written comments and materials to Dr. Scott Rumsey, National Marine Fisheries Service, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232. Comments may also be submitted by email to: *nmfs.nwr.lowercolumbiaplan@noaa.gov*. Please include ''Comments on Lower Columbia Recovery Plan'' in the subject line of the email. Comments may be submitted via facsimile (fax) to (503) 230–5441. Electronic copies of the Proposed Plan are available on the NMFS Web site at *http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Willamette-Lower-Columbia/LC/Plan.cfm*. Persons wishing to obtain an electronic copy on CD ROM of the Proposed Plan may do so by calling Kelly Gallivan at (503) 736–4721 or by emailing a request to *kelly.gallivan@noaa.gov* with the subject line ''CD ROM Request for Lower Columbia Recovery Plan.''

FOR FURTHER INFORMATION CONTACT: Dr. Scott Rumsey, Salmon Recovery Branch Chief, Protected Resources Division, at (503) 872–2791, or *scott.rumsey@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On May 16, 2012, we published a notice announcing that the Proposed Plan was available for public review and comment (77 FR 28855). Comments were due by July 16, 2012. On June 22, 2012, we received a letter from the Pacific Fisheries Management Council (Council) requesting an extension of the public comment period. The Council noted that the comment period precluded the opportunity for their advisory bodies and staff to review the Proposed Plan and develop comments for approval at the September 2012 Council meeting. The Council is a valued partner in planning and implementing recovery for West Coast salmon and steelhead. To afford the Council sufficient opportunity to review the Proposed Plan and provide comments through their typical processes, we are reopening the comment period for 30 days. New comments will be due by October 9, 2012.

For background information on the development, content, and expected use of the Plan, please refer to the original notice of availability for public comment (77 FR 28855; May 16, 2012) or our Web site at *http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Willamette-Lower-Columbia/LC/Plan.cfm*.

Public Comments Solicited

We are soliciting written comments on the Proposed Plan. All substantive comments received by the date specified above will be considered and incorporated, as appropriate, prior to our decision whether to approve the plan. We will issue a news release announcing the adoption and availability of a final plan. We will post on the Northwest Region Web site (*www.nwr.noaa.gov*) a summary of, and responses to, the comments received, along with electronic copies of the final plan and its appendices.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: September 4, 2012.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–22110 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC219

Fishing Capacity Reduction Program for the Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of loan repayment.

SUMMARY: NMFS issues this notice to inform interested parties that the California Dungeness crab sub-loan in the fishing capacity reduction program for the Pacific Coast Groundfish Fishery has been repaid. Therefore, buyback fee collections on California Dungeness crab will cease for all landings after June 30, 2012.

DATES: Comments must be submitted on or before 5 p.m. EST September 24, 2012.

ADDRESSES: Send comments about this notice to Paul Marx, Chief, Financial Services Division, NMFS, Attn: California Dungeness Crab Buyback, 1315 East-West Highway, Silver Spring, MD 20910 (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Michael A. Sturtevant at (301) 427–8799, fax (301) 713–1306, or *michael.a.sturtevant@noaa.gov*.

SUPPLEMENTARY INFORMATION: On November 16, 2004, NMFS published a **Federal Register** document (69 FR 67100) proposing regulations to implement an industry fee system for repaying the reduction loan. The final rule was published July 13, 2005 (70 FR 40225) and fee collection began on September 8, 2005. Interested persons should review these for further program details.

The California Dungeness crab sub-loan of the Pacific Coast Groundfish Capacity Reduction (Buyback) loan in the amount of $2,334,334.20 will be repaid in full upon receipt of buyback fees on landings through June 30, 2012. NMFS has received $3,446,217.69 to repay the principal and interest on this sub-loan since fee collection began September 8, 2005. Buyback fees in the California Dungeness crab fishery increased rapidly in December 2011 through March 2012 which reduced the $1 million balance on the loan in a short period of time resulting in early loan repayment. Therefore, these buyback loan fees will no longer be collected in the California Dungeness crab fishery.

Based on buyback fees received to date, landings after June 30, 2012 will not be subject to the buyback fee. Buyback fees not yet forwarded to NMFS for California Dungeness crab landings through June 30, 2012 should be forwarded to NMFS immediately. Any overpayment of buyback fees submitted to NMFS will be refunded on a pro-rata basis to the fish buyers/processors based upon best available fish ticket landings data. The fish buyers/processors should return excess buyback fees collected to the harvesters, including buyback fees collected but not yet remitted to NMFS for landings after June 30, 2012. Any discrepancies in fees owed and fees paid must be resolved immediately. After the sub-loan is closed, no further adjustments to fees paid and fees received can be made. Fish dealers whose fees for 2012 were not yet due as they have accumulated less than $100 in fees should forward their fees at this time for landings through June 30, 2012.

Dated: August 31, 2012.

Cherish Johnson,

Acting Director, Office of Management and Budget, National Marine Fisheries Service.

[FR Doc. 2012–22119 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC216

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Scientific and Statistical Committee (SSC) of the Mid-Atlantic Fishery Management Council (Council) will hold meetings.

DATES: The SSC will meet Wednesday and Thursday, September 26–27, 2012 beginning at 9 a.m. on September 26 and conclude by 3 p.m. on September 27.

ADDRESSES: The meeting will be held at the Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231 telephone: (410) 539–2000.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The primary issues for the SSC meeting include: Developing 2013–17 ABC recommendations for the Council for spiny dogfish; considerations for setting multi-year ABC specifications; ABC/OY control rule frameworks and ecosystem approaches to fishery management; presentation on forage species considerations; review and update Council five-year research priority plan, as appropriate; and address Council's request to clarify the SSC's 2012 butterfish ABC recommendations if necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: September 4, 2012.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–22024 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC221

New England Fishery Management Council (NEFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a three-day meeting on September 25–27, 2012 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Tuesday, Wednesday and Thursday, September 25–27, starting at 9 a.m. on Tuesday, at 8:30 a.m. on Wednesday and 8 a.m. on Thursday.

ADDRESSES: The meeting will be held at the Radisson Hotel Plymouth Harbor, 180 Water Street, Plymouth, MA 02360; telephone: (508) 747–4900; fax: (508) 746–2609; or online at *www.radisson.com/plymouth-hotel-ma-02360/maplyhar.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Tuesday, September 25, 2012

Following introductions and any announcements, the annual election of Council officers will take place once all newly appointed members have been sworn in by the NOAA Fisheries Regional Administrator/Northeast Region. Brief reports will then be provided by the NEFMC Chairman and Executive Director, the Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel, representatives of the Atlantic States Marine Fisheries Commission, and staff from the regional Vessel Monitoring Systems Operations and NOAA Law Enforcement offices. The Council also will receive an update about Northeast Regional Ocean Council activities. The new Coast Guard First District Commander will provide his perspective on fisheries issues, and following a lunch break, the Northeast Fisheries Science Center (NEFSC)

Director will present an overview of the Center's draft Strategic Plan. A question and answer period is scheduled to accompany the presentation. NEFMC staff will provide findings and recommendations concerning the use of socio-cultural information in the NEFMC process. Three additional reports will follow: the Spiny Dogfish Committee will ask for final approval of measures to be included in Amendment 3 to the Spiny Dogfish Fishery Management Plan (FMP); the Monkfish Committee will update the Council on its progress to develop management alternatives for inclusion in Amendment 6 to the Monkfish FMP; and the Council's Enforcement Committee will review any recommendations relative to NOAA's enforcement priorities for 2013, fishing gear stowage requirements, and new forms proposed by NOAA as part of a new information collection system. The day will end with a listening session that the audience and larger public may participate in via webinar. For this Council meeting, the focus will be on the new Northeast Regional Administrator, his views and opinions, and his recent visits to many coastal communities in the Northeast.

Wednesday, September 26, 2012

The Council will receive a report from the NEFSC summarizing the findings of the 54th Stock Assessment Workshop/Stock Assessment Review Committee meetings. The species addressed were Atlantic herring, and Southern New England/Mid-Atlantic yellowtail flounder. The Council's Scientific and Statistical Committee will report on its acceptable biological catch recommendations for groundfish stocks for fishing years 2013–15, Atlantic herring for 2013–15 and sea scallops for 2013–14. The Herring Committee will address the recent court decision about Amendment 4 to the Atlantic Herring FMP and ask the Council to consider actions to address the court order. Discussion also will cover initial development of Atlantic herring fishery specifications for the upcoming fishing years 2013–15, including possible action to maintain the 2012 specifications through 2013 and develop a separate package for 2014–16. The Scallop Committee will report later in the day about management measures proposed for Atlantic Sea Scallop FMP Framework Adjustment 24/Groundfish FMP Framework Adjustment 49. Framework 24 is an action to set fishery specifications for fishing years 2013 and 2014, but includes other measures: a possible modification of the Georges Bank access area seasonal closures; measures to address yellowtail flounder bycatch in the limited access general category (LAGC) fishery; the potential allowance of quota transfer during the year for LAGC individual fishery quota vessels; and measures to expand the observer set-aside program to include LAGC scallop vessels in open areas. At the end of the day, the Council will hear about the 2012 assessments for the transboundary stocks of Eastern Georges Bank cod and haddock, and Georges Bank yellowtail flounder. The day will conclude with consideration and approval of fishing year 2013 quotas for these same stocks.

Thursday, September 27, 2012

The Council may approve a small mesh multispecies control date for the red hake, silver hake and offshore hake fisheries. This issue will be followed by a lengthy Groundfish Committee report on a range of issues including: the development of Framework 48 to the Northeast Multispecies (Groundfish) FMP, an action that may include fishing year 2013–15 overfishing levels and acceptable biological catches for a number of stocks managed through this FMP; the creation of a Southern New England/Mid-Atlantic windowpane flounder sub-annual catch limit (sub-ACL) for the sea scallop fishery; adjustments to the Southern New England/Mid-Atlantic and Georges Bank yellowtail flounder sub-ACLs for the scallop fishery; sector monitoring issues; adjustments to recreational fishing measures if necessary; and consideration of other adjustments to the groundfish management measures. As part of this action, the Council also will consider recommendations for allowing increased access to the groundfish closed areas to mitigate expected low acceptable biological catches for groundfish stocks in fishing year 2013.

During the afternoon session on Thursday the Habitat Committee will request that the Council consider splitting the deep-sea coral alternatives off from the Omnibus EFH Amendment 2, and possibly initiating development of a coral-focused omnibus amendment. The Council also may endorse a Memorandum of Understanding related to deep-sea corals, and will review the draft adverse effects minimization alternatives under development in Omnibus EFH Amendment 2. The day will conclude with an initial discussion of the Council's 2013 management priorities.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: September 4, 2012.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–22025 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC182

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: Members of the Pacific Fishery Management Council's (Pacific Council) Scientific and Statistical Committee Subcommittee on Coastal Pelagic Species (SSC Subcommittee) will hold a meeting that is open to the public.

DATES: The meeting will be held Tuesday, October 2, 2012 through Wednesday, October 3, 2012. Business will begin each day at 8:30 a.m. and conclude at 5 p.m. or until business for the day is completed.

ADDRESSES: The meeting will be held in the Large Conference Room of the Southwest Fisheries Science Center's Torrey Pines Court Facility, 3333 North Torrey Pines Court, La Jolla, CA 92037.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting is to review the updated Pacific sardine stock assessment for 2012. The results of the assessment update will be used to establish management measures and

harvest specifications for the 2013 Pacific sardine fishery. The SSC Subcommittee will develop a report for consideration by the full SSC, at the November 2012 Pacific Council meeting.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: September 4, 2012.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–22029 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC050

Marine Mammals; File No. 17236

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to Robert A. Garrott, Ecology Department, Montana State University, 310 Lewis Hall, Bozeman, MT 59717 to conduct research on Weddell seals (*Leptonychotes weddellii*) for scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

FOR FURTHER INFORMATION CONTACT: Colette Cairns or Tammy Adams, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On May 31, 2012, notice was published in the **Federal Register** (77 FR 32081) that a request for a permit to conduct research on Weddell seals had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

The permit holder is authorized to continue long-term studies of the Weddell seal population in the Erebus Bay, McMurdo Sound, Ross Sea and White Island areas of Antarctica. Up to 425 adults and 700 pups will be captured annually. Animals will be weighed, tissue sampled, flipper tagged, and released. A subset of 200 pups annually will have a small temperature logging tag attached. The permit holder is authorized to opportunistically collect, import, and export Weddell seal parts and carcasses. Annually, up to 2,000 Weddell, 50 crabeater (*Lobodon carcinophagus*), and 50 leopard (*Hydrurga leptonyx*) seals may be incidentally disturbed as a result of research activities. Up to 4 (2 adults and 2 pups) Weddell seal research-related mortalities are authorized annually. The permit is valid for five years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: August 31, 2012.

Tammy C. Adams,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–22112 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB155

Endangered Species; File No. 17095

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Entergy Nuclear Operations Inc., 450 Broadway, Suite 3, Buchanan, NY 10511 [Responsible Party: John Ventosa], has been issued a permit to take shortnose sturgeon (*Acipenser brevirostrum*) and Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

- Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and
- Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Colette Cairns, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On April 11, 2012, notice was published in the **Federal Register** (77 FR 21750) that a request for a scientific research permit to take shortnose sturgeon and Atlantic sturgeon had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The Permit Holder is issued a five-year permit to study shortnose sturgeon and Atlantic sturgeon in the Hudson River Estuary from New York Harbor (RKM 0) to Troy Dam (RKM 245). The research will monitor abundance and distribution of the sturgeon species through the Hudson River Biological Monitoring Program (HRBMP), focusing on fish identification, mark and recapture, and enumeration of sturgeon in defined Hudson River regions and at various depth strata. Researchers are authorized to non-lethally capture, handle, measure, weigh, scan for tags, insert passive integrated transponder and dart tags, photograph, tissue sample, and release up to 82 shortnose sturgeon and 82 Atlantic sturgeon annually. Additionally, researchers are permitted to lethally collect up to 40 shortnose sturgeon and up to 40 Atlantic sturgeon early life stages annually. The permit would be valid for five years from the date of issuance.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good

faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: September 4, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–22116 Filed 9–6–12; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 10/8/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 7/9/2012 (77 FR 40344–40345), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. The action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type/Location: Fire Watch Service, U.S. Coast Guard Yard, Curtis Bay, 2401 Hawkins Point Road, Baltimore, MD.
NPA: DePaul Industries, Portland, OR.
Contracting Activity: Dept of Homeland Security, U.S. Coast Guard, SFLC Procurement Branch 3, Baltimore, MD.

Service Type/Location: Hospital Housekeeping Services, Winn Army Community Hospital, 1061 Harmon Avenue, Fort Stewart, GA.
NPA: Professional Contract Services, Inc., Austin, TX.
Contracting Activity: Dept of the Army, W40M Southeast RGNL CONTRG OFC, Fort Gordon, GA.

Patricia Briscoe,

Deputy Director, Business Operations, (Pricing and Information Management).

[FR Doc. 2012–22077 Filed 9–6–12; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Public Meetings for the Draft Environmental Impact Statement for Naval Weapons Systems Training Facility Boardman, OR

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 and regulations implemented by the Council on Environmental Quality (40 Code of Federal Regulations parts 1500–1508), the Department of the Navy (DoN) has prepared and filed with the U.S. Environmental Protection Agency a Draft Environmental Impact Statement (EIS) that evaluates the potential environmental effects associated with ongoing and proposed DoN and Oregon National Guard training and testing activities at Naval Weapons Systems Training Facility (NWSTF) Boardman, Oregon to include establishment of new associated Special Use Airspace (SUA). The National Guard Bureau and Federal Aviation Administration are cooperating agencies for this EIS.

NWSTF Boardman is the principal regional training range for aviation units located at Naval Air Station Whidbey Island and is used for training by Oregon National Guard units located throughout the state of Oregon. NWSTF Boardman also supports training requirements of the U.S. Air Force Reserve, and SUA activities for Department of Defense (DoD) contractors for unmanned aerial system testing and training of DoD personnel.

With the filing of the Draft EIS, the DoN is initiating a 60-day public comment period and has scheduled two public meetings to receive comments on the Draft EIS. This notice announces the dates and locations of the public meetings for the Draft EIS and provides supplementary information.

DATES AND ADDRESSES: The 60-day Draft EIS public review period will begin September 7, 2012, and end on November 6, 2012. The DoN will hold two public meetings to inform the public about the proposed action and the alternatives under consideration, and to provide an opportunity for the public to comment on the proposed action, alternatives, and the adequacy and accuracy of the analysis in the Draft EIS. Each of the public meetings will include an open house information session, with informational poster stations staffed by DoN and Oregon National Guard representatives, followed by a short presentation and oral comment opportunity. Federal, state, and local agencies and officials, and interested groups and individuals are encouraged to provide comments in person at any of the public meetings or in writing during the public comment period.

The public meetings will be held at each location between 5:00 p.m. and 8:00 p.m. on the following dates:

1. Tuesday, September 25, 2012, Hermiston Conference Center Great Room, 415 South Highway 395, Hermiston, Oregon 97838.

2. Wednesday, September 26, 2012, Port of Morrow Conference Center Riverfront Room, 2 Marine Drive, Boardman, Oregon 97818.

Attendees will be able to submit oral and written comments during the public meetings. Oral testimony from the public will be recorded by a court reporter. In the interest of available time, and to ensure all who wish to give an oral statement have the opportunity to do so, each speaker's comments will

be limited to three (3) minutes. Equal weight will be given to oral and written statements. Comments may also be submitted via the U.S. Postal Service or electronically via the project Web site provided below. All statements, oral or written, submitted during the public review period will become part of the public record on the Draft EIS and will be reviewed and acknowledged or responded to in the Final EIS.

Public meeting details will be announced in local newspapers. Additional information is available on the project Web site at *www.NWSTFBoardmanEIS.com.*

FOR FURTHER INFORMATION CONTACT: Naval Facilities Engineering Command, Northwest, Attention: Ms. Amy Burt—NWSTF Boardman EIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, Washington 98315–1101.

SUPPLEMENTARY INFORMATION: A Notice of Intent to prepare this Draft EIS was published in the **Federal Register** on October 5, 2010 (75 FR 61452). A separate and additional scoping effort was conducted to address the modification of the proposed action to include establishment of a Military Operations Area that would join the current SUA associated with NWSTF Boardman. The Notice of Intent for the modification of the proposed action was published in the **Federal Register** on December 27, 2011 (76 FR80910).

The DoN's proposed action involves construction and operation of new range facilities and changes in existing training and testing activities at NWSTF Boardman. In general, the proposed action would increase the types of training and testing activities and the number of training events conducted at NWSTF Boardman; accommodate force structure changes; and provide enhancements to training facilities and activities at NWSTF Boardman and its associated SUA.

To comply with federal mandates, the DoN proposes to maintain and enhance current levels of military readiness through improvement of training at NWSTF Boardman, accommodate possible future increases in training, and maintenance of the long-term viability of NWSTF Boardman as a military training and testing area. The proposed action is needed to provide a training environment consisting of ranges, training areas, and range instrumentation with the capacity and capabilities to fully support required training tasks for military units and personnel utilizing NWSTF Boardman.

The Draft EIS includes analysis of the potential environmental impacts of three alternatives, including the No Action Alternative and two action alternatives. The No Action Alternative constitutes the current level of baseline training and testing activities. Alternative 1 includes all current training and testing activities; the establishment and use of an additional Military Operations Area to the northeast of existing NWSTF Boardman SUA; an increase in existing training activities; new training activities; and range enhancements and facilities to meet DoN and Oregon National Guard training requirements. Alternative 2 includes all elements of Alternative 1 and the implementation of additional range enhancements, including the addition of a second (western) convoy live-fire range, a new range operations control center, and three mortar training positions.

Mitigation measures for potential effects to biological resources are being coordinated through appropriate Federal agencies. There are no Federally-listed species under the Endangered Species Act present at NWSTF Boardman, however, the DoN is conferencing with the U.S. Fish and Wildlife Service, as appropriate, for potential impacts to the candidate species, Washington ground squirrel (Urocitellus washingtoni).

The Draft EIS was distributed to Federal, state, and local agencies, elected officials, and other interested individuals and organizations. Copies of the Draft EIS are also available for public review at the following public libraries:

1. Multnomah County Central Library, 801 Southwest 10th Avenue, Portland, Oregon 97205.

2. Boardman Branch of the Oregon Trail Library District, 200 South Main Street, Boardman, Oregon 97818.

3. Heppner Branch of the Oregon Trail Library District, 444 North Main Street, Heppner, Oregon 97836.

4. Central Branch of the Salem Public Library, 585 Liberty Street Southeast, Salem, Oregon 97301.

5. West Salem Branch of the Salem Public Library, 395 Glen Creek Road Northwest, Salem, Oregon 97304.

6. Stafford Hansell Government Center, 915 Southeast Columbia Drive, Hermiston, Oregon 97838.

Copies of the Draft EIS are also available for electronic viewing at *www.NWSTFBoardmanEIS.com.* A paper copy of the Executive Summary or a single compact disc of the Draft EIS will be made available upon written request.

Dated: August 31, 2012.

C.K. Chiappetta

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–22097 Filed 9–6–12; 8:45 am]

BILLING CODE 3810–FF–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 77 FR 48970, August 15, 2012.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING AND HEARING: Session I: 1 p.m.–5 p.m., October 2, 2012; Session II: 6:30 p.m.–9 p.m., October 2, 2012.

CHANGES TO OPEN MEETING AND HEARING: The Defense Nuclear Facilities Safety Board (Board) published a notice in the **Federal Register** of August 15, 2012, (77 FR 48970), concerning a two-session public meeting and hearing on October 2, 2012, at the Knoxville Convention Center, 701 Henley Street, Knoxville, Tennessee 37902. The Board changes that notice as follows: (1) The Board is postponing the hearing session concerning nuclear operations at existing Y–12 defense nuclear facilities, the effectiveness of the National Nuclear Security Administration's oversight for these activities, and the status of site-wide emergency preparedness. That session will be rescheduled as a separate open meeting and hearing at a time and place to be determined at a later date; (2) The Board will now limit the meeting and hearing to receive testimony regarding factors that could affect the timely execution and safety of the Uranium Processing Facility (UPF) project. These factors include the Department of Energy (DOE) project team's strategy for identifying and resolving safety issues in a timely manner, the potential safety impacts of DOE's decision to accelerate the acquisition of select processing capabilities and defer others to a later date, and the potential for weaknesses in technology development to impact safety; (3) The Board is convening the meeting and hearing concerning the UPF project from 1 p.m.–5 p.m. There will be no evening Session. The date and place of the meeting and hearing remains unchanged. The public hearing portion of this proceeding is authorized by 42 U.S.C. 2286b.

CONTACT PERSON FOR MORE INFORMATION: Debra Richardson, Deputy General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW.,

Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

Dated: September 4, 2012.

Peter S. Winokur,

Chairman.

[FR Doc. 2012–22187 Filed 9–5–12; 4:15 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before November 6, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Jacqueline D. Rogers, U.S. Department of Energy, Office of Health, Safety and Security, HS–11, 1000 Independence Avenue SW., Washington, DC 20585, by fax at 202–586–8548, or by email at: *jackie.rogers@hq.doe.gov*, or information about the collection instruments may be obtained at: *http://www.hss.dow.gov/pra.html.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jacqueline D. Rogers, U.S. Department of Energy, Office of Health, Safety and Security, HS–11, 1000 Independence Avenue SW., Washington, DC 20585, or by fax at 202–586–8548, or by email at *jackie.rogers@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB Control No.:* 1910–5112; (2) *Information Collection Request Title:* Final Rule: Chronic Beryllium Disease Prevention Program; (3) *Type of Review:* Renewal; (4) *Purpose:* This collection provides the Department with the information needed to continue reducing the number of workers currently exposed to beryllium in the course of their work at DOE facilities managed by DOE or its contractors; minimize the levels and potential exposure to beryllium; to provide information to employees, to provide medical surveillance to ensure early detection of disease; and to permit oversight of the programs by DOE management; (5) *Annual Estimated Number of Respondents:* 4,499 (22 DOE sites and 4,477 workers affected by the rule); (6) *Annual Estimated Number of Total Responses:* 15,881; (7) *Annual Estimated Number of Burden Hours:* 25,036; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $1,293,623; (9) *Response Obligation:* Mandatory.

Statutory Authority: Atomic Energy Act of 1954, 42 U.S.C. 2201, and the Department of Energy Organization Act, 42 U.S.C. 7191 and 7254.

Issued in Washington, DC on August 29, 2012.

Stephen A. Kirchhoff,

Director, Office of Resource Management, Office of Health, Safety and Security.

[FR Doc. 2012–22083 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 12–77–LNG]

LNG Development Company, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas Produced From Canadian and Domestic Natural Gas Resources to Non-Free Trade Agreement Countries for a 25-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application) filed on July 16, 2012, by LNG Development Company, LLC (d/b/a Oregon LNG), requesting long-term, multi-contract authorization to export up to 9.6 million tons per annum (mtpa) of liquefied natural gas (LNG), the equivalent of 456.25 billion cubic feet (Bcf) of natural gas per year or 1.3 Bcf per day (Bcf/d), over a 25-year period, commencing on the earlier of the date of first export or eight years from the date the requested authorization is granted. The LNG would be exported from the proposed LNG terminal to be located in Warrenton, Oregon, in Clatsop county, to any country (1) With which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas, (2) which has developed or in the future develops the capacity to import LNG via ocean-going carrier, and (3) with which trade is not prohibited by U.S. law or policy. The LNG will be produced from natural gas imported from Canada into the United States, and to a lesser extent, domestically produced natural gas. Oregon LNG is requesting this authorization to export LNG both on its own behalf and as agent for other parties who hold title to the LNG at the point of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the *Public Comment Procedures* section no later than 4:30 p.m., eastern time, November 6, 2012.

ADDRESSES:

Electronic Filing by email

fergas@hq.doe.gov.

Regular Mail

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Larine Moore or Marc Talbert, U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–7991.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6B–256, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

Oregon LNG is a Delaware limited liability company with its principal place of business in Warrenton, Oregon, and headquarters in Vancouver, Washington.

Oregon LNG states that the Oregon LNG Export Project (Project) is proposed to export primarily Canadian-sourced natural gas imported into the United States and to a lesser extent supplies of natural gas that may be domestically produced. Oregon LNG states the Project will convert Oregon LNG's pending import receiving terminal and pipeline (Oregon Pipeline) into a bidirectional LNG terminal and pipeline. The Oregon Pipeline is being developed by Oregon LNG's affiliate, Oregon Pipeline Company, LLC. Oregon LNG states that the Project will interconnect with the multi-legged system of Williams Northwest Pipeline Company, connecting Pacific Northwest demand centers with British Columbian and Rockies supplies. However, Oregon LNG asserts it does not expect that the gas feedstock for the Project will be derived to any significant degree from Rockies supply given that the market modeling commissioned by Oregon LNG demonstrates that Canadian supply is the economically preferred resource for the Project.

Oregon LNG states that unlike the multiple pending applications to export domestically produced LNG to non-FTA countries, this Application involves a request for authorization to export LNG produced primarily from Canadian natural gas resources. Oregon LNG further states that in this regard, this Application is akin to applications for authorization to export previously imported LNG, which DOE/FE has expeditiously granted.[1] Oregon LNG states that the same rationale applies here.

Current Application

In the instant application, Oregon LNG seeks long-term, multi-contract authorization to export up to 9.6 mtpa of natural gas produced in Canada, and to a lesser extent, domestically produced natural gas, as LNG (the equivalent of 456.25 Bcf per year, or 1.3 Bcf/d of natural gas), for a period of 25 years beginning on the earlier of the date of first export or eight years from the date the authorization is granted by DOE/FE. Oregon LNG requests that such long-term authorization provide for export from its LNG terminal to be located in Warrenton, Oregon, in Clatsop County, to any country with which the United States does not have an FTA requiring national treatment for trade in natural gas, which has developed or in the future develops the capacity to import LNG via ocean-going carrier, and with which trade is not prohibited by U.S. law or policy.

Oregon LNG requests authorization to export LNG acting on its own behalf or as agent for others. At present, Oregon LNG does not contemplate entering into any long-term gas supply or long-term export contracts in conjunction with the LNG export authorization requested herein. Rather, Oregon LNG will enter into capacity use arrangements with potential Project participants or third-party customers. Accordingly, Oregon LNG is not submitting transaction-specific information such as long-term supply agreements and long-term export agreements, as required by Section 590.202(b) of the DOE regulations, at this time. Instead, Oregon LNG requests that DOE/FE adhere to the precedent set forth in *Sabine Pass Liquefaction, LLC,* DOE/FE Order No. 2961, at 41, where DOE/FE found that given the state of development for the proposed export project, Sabine Pass would be permitted to submit transaction-specific information when the contracts reflecting such information were executed.

Public Interest Considerations

Oregon LNG states that the Project has been proposed due to the improved outlook for North American natural gas production, owing to drilling productivity gains that enabled rapid growth in supplies from unconventional, and particularly shale, gas-bearing formations in the United States and Canada. Oregon LNG states that improvements in drilling and extraction technologies have coincided with rapid diffusion in the natural gas industry's understanding of the unconventional resource base and best practices in drilling and resource development. Oregon LNG states that these changes have rendered obsolete once prominent fears of declining future domestic natural gas production.

According to Oregon LNG, the Project offers various benefits to the public, including the much needed expansion of market scope and access for North American natural gas producers at times when neither U.S. nor Canadian gas prices support continued production. Oregon LNG states that the North American supply glut has depressed domestic natural gas prices to historic lows (below $2.00 per MMbtu) not experienced since 1999.[2] Oregon LNG further states that analysts have expressed concern that the Canadian gas storage levels may reach capacity in June 2012, potentially affecting U.S. natural gas prices as Canadian producers attempt to move surplus gas across the border to the U.S.

Oregon LNG states that the influx of labor needed to complete the Project will have a major positive impact on the region's economy. In its letter of support, the United Brotherhood of Carpenters and Joiners of America points out that regional unemployment in the construction sector has hovered around 17 percent, which is twice the rate of general unemployment. Oregon LNG states that from 2014 unitl the anticipated completion date in 2018, the construction phase will create an average of 3,054 direct-employment, new construction jobs for the Project.

Oregon LNG states that the economic impact of a construction project goes well beyond the direct costs of construction. If the Project requires sheet metal from a local producer, for example, an indirect impact will be felt by the hiring of new workers at the manufacturer. The regional indirect impact of the construction phase of the Project is estimated at $2.79 billion and the average, indirect employment impact spread over the anticipated 5-year period involving construction efforts is estimated at 2,579 jobs.

Oregon LNG states that its exports will result in a net improvement in the balance of trade for the U.S. even after deducting gas imports from Canada. If approved, the export authorization is projected to reduce the U.S. trade deficit by $4.5 billion per year over a 25-year period for an estimated total of $112.5 billion of net deficit reduction over the life of the Project.

Further details can be found in the Application, which has been posted at *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Environmental Impact

Oregon LNG states that the potential environment impacts of the Project will be reviewed by the Federal Energy Regulatory Commission (FERC) under

[1] *Citing, ConocoPhillips Company, Order Granting Blanket Authorization to Export Previously Imported Liquefied Natural Gas by Vessel,* FE Docket No. 11–109–LNG, DOE/FE Order No. 3038 (November 22, 2011).

[2] *Citing,* U.S. Energy Information Administration (EIA), *U.S. Natural Gas Wellhead Price, http://www.eia.gov/dnav/ng/his/n9190us3m.htm.*

the National Environmental Policy Act (NEPA). Oregon LNG and Oregon Pipeline Company requested authorization to commence FERC's mandatory NEPA pre-filing process for the Project on July 3, 2012, in FERC Docket No. PF12–18–000. Oregon LNG and Oregon Pipeline Company anticipate filing a formal application with FERC pursuant to Section 3 of the Natural Gas Act (NGA) no later than the First Quarter of 2013. Accordingly, Oregon LNG requests that, pursuant to Section 590.402 of the DOE Regulations, DOE/FE issue a conditional order authorizing the export of LNG as requested in the Application, conditioned on completion of the environmental review of the Export Project by FERC.

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3 of the NGA, as amended, and the authority contained in DOE Delegation Order No. 00–002.00L (April 29, 2011) and DOE Redelegation Order No. 00–002.04E (April 29, 2011). In reviewing this LNG export Application, DOE will consider any issues required by law or policy. To the extent determined to be relevant or appropriate, these issues will include the impact of LNG exports associated with this Application, and the cumulative impact of any other application(s) previously approved, on domestic need for the gas proposed for export, adequacy of domestic natural gas supply, U.S. energy security, and any other issues, including the impact on the U.S. economy (GDP), consumers, and industry, job creation, U.S. balance of trade, international considerations, and whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this Application should comment in their responses on these issues, as well as any other issues deemed relevant to the Application.

NEPA requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Due to the complexity of the issues raised by the Applicants, interested persons will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, notices of intervention, or motions for additional procedures.

Public Comment Procedures

In response to this notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) emailing the filing to *fergas@hq.doe.gov* with FE Docket No. 12–77–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**. The filing must include a reference to FE Docket No. 12–77–LNG; or (3) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**. The filing must include a reference to FE Docket No. 12–77–LNG.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application filed by Oregon LNG is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html*.

Issued in Washington, DC, on August 31, 2012.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2012–22088 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Radiation Detection Technologies, Inc.

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of intent to grant exclusive patent license.

SUMMARY: Notice is hereby given to an intent to grant to Radiation Detection Technologies, Inc., of Manhattan, Kansas, an exclusive license to practice the inventions described in U.S. Patent No. 6,545,281, entitled ''Pocked Surface Neutron Detector''. The invention is owned by the United States of America, as represented by the U.S. Department of Energy (DOE).

DATES: Written comments or nonexclusive license applications are to be received at the address listed below no later than October 9, 2012.

ADDRESSES: Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: John T. Lucas, Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Forrestal Building, Room 6F–

067, 1000 Independence Ave. SW., Washington, DC 20585; Telephone (202) 586–2939.

SUPPLEMENTARY INFORMATION: 35 U.S.C. 209 provides federal agencies with authority to grant exclusive licenses in federally-owned inventions, if, among other things, the agency finds that the public will be served by the granting of the license. The statute requires that no exclusive license may be granted unless public notice of the intent to grant the license has been provided, and the agency has considered all comments received in response to that public notice, before the end of the comment period.

Radiation Detection Technologies, Inc., of Manhattan, Kansas has applied for an exclusive license to practice the inventions embodied in U.S. Patent No. 6,545,281 and has plans for commercialization of the inventions.

The exclusive license will be subject to a license and other rights retained by the U.S. Government, and other terms and conditions to be negotiated. DOE intends to negotiate to grant the license, unless, within 30 days of this notice, the Assistant General Counsel for Technology Transfer and Intellectual Property, Department of Energy, Washington, DC 20585, receives in writing any of the following, together with supporting documents:

(i) A statement from any person setting forth reason why it would not be in the best interests of the United States to grant the proposed license; or

(ii) An application for a nonexclusive license to the invention in which applicant states that it already has brought the invention to practical application or is likely to bring the invention to practical application expeditiously.

The Department will review all timely written responses to this notice, and will proceed with negotiating the license if, after consideration of written responses to this notice, a finding is made that the license is in the public interest.

Issued in Washington, DC on August 31, 2012.

John T. Lucas,

Assistant General Counsel for Technology Transfer and Intellectual Property.

[FR Doc. 2012–22085 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy, Office of the Secretary.

ACTION: Notice of renewal.

SUMMARY: Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act, (Pub. L. 92–463), and in accordance with Title 41 of the Code of Federal Regulations, Section 102–3.65(a), and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Secretary of Energy Advisory Board (SEAB) will be renewed for a two-year period beginning on August 30, 2012.

The Committee will provide advice and recommendations to the Secretary of Energy on a range of energy-related issues.

Additionally, the renewal of the SEAB has been determined to be essential to conduct business of the Department of Energy and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy, by law and agreement. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, adhering to the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Amy Bodette, Designated Federal Officer at (202) 586–0383.

Issued at Washington, DC on August 30, 2012.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2012–22072 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Monday, October 15, 2012, 9:00 a.m. to 5:00 p.m. and Tuesday, October 16, 2012, 8:30 a.m. to 12:00 p.m.

ADDRESSES: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

FOR FURTHER INFORMATION CONTACT: Dr. David Thomassen, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–23/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290. Phone (301) 903–9817; fax (301) 903–5051 or email: *david.thomassen@science.doe.gov*. The most current information concerning this meeting can be found on the Committee's Web site: *http://science.energy.gov/ber/berac/meetings/*.

SUPPLEMENTARY INFORMATION: *Purpose of the Meeting:* To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda Topics

- Report from the Office of Biological and Environmental Research
- News from the Biological Systems Science and Climate and Environmental Sciences Divisions
- Discussion of charge on the development and use of new tools mentioned in the BERAC ''Long Term Vision'' report
- Updates on the Bioenergy Research Centers and the Program for Climate Model Diagnosis and Intercomparison
- Workshop updates
- New Business
- Public Comment

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact David Thomassen at the address or telephone number listed above. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 45 days at the BERAC Web site: *http://science.energy.gov/ber/berac/meetings/berac-minutes/*.

Issued in Washington, DC on August 30, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–22074 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, September 27, 2012; 11 a.m. to 1 p.m. (EDT)

ADDRESSES: Participants may contact Ms. Joanne Corcoran by September 25, 2012 at email: *joanne.corcoran@science.doe.gov* or by phone at (301) 903–6488, to receive a call-in number. Public participation is welcomed; however, the number of teleconference lines is limited and available on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Dr. David Thomassen, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–23/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290. Phone (301) 903–9817; fax (301) 903–5051 or email: *david.thomassen@science.doe.gov*. The most current information concerning this meeting can be found on the Web site: *http://science.energy.gov/ber/berac/meetings/*.

SUPPLEMENTARY INFORMATION: *Purpose of the Meeting:* To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda Topics:

- Discussion of the final edits to the BERAC report based on the charge letter dated, September 14, 2011, (*http://science.energy.gov/~/media/ber/berac/pdf/Tech-charge.pdf*).

Public Participation: The teleconference meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding the item on the agenda, you should contact David Thomassen at the address or telephone number listed above. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 45 days at the BERAC Web site: *http://science.energy.gov/ber/berac/meetings/berac-minutes/*.

Issued in Washington, DC on August 30, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–22073 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

State Energy Advisory Board (STEAB); Meeting

AGENCY: Department of Energy, Energy Efficiency and Renewable Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a live open meeting of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat.770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: October 9, 2012; 9 a.m. to 5 p.m. October 10, 2012; 9 a.m. to 5 p.m. October 11, 2012; 9 a.m. to 12 p.m.

ADDRESSES: Hyatt Place Long Island/East End, 451 East Main Street, Riverhead, NY 11901.

FOR FURTHER INFORMATION CONTACT: Gil Sperling, STEAB Designated Federal Officer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Ave SW., Washington DC 20585. Telephone: (202) 287–1644.

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* To provide advice and make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Receive in person updates and reviews of accomplishment of STEAB's Subcommittee and Task Forces, meet with members of Brookhaven National Laboratory (BNL) and staff from the New York State Energy Research and Development Authority to discuss Laboratory and State collaborations and energy partnerships, new initiatives and technologies being created at the Laboratory, explore possible technology transfer programs, and meet with Laboratory employees to gain a better understanding of deployment efforts and ongoing initiatives, as well as update to the Board on routine business matters and other topics of interest.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gil Sperling at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 90 days on the STEAB Web site, *www.steab.org*.

Issued at Washington, DC on August 30, 2012.

LaTanya Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–22071 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket Nos.12–64–NG; 12–71–NG]

Notice of Orders Granting Applications to Import and Export Natural Gas and Vacating Prior Authority During July 2012; J. Aron & Company; Iberdrola Renewables, LLC

AGENCY: Office of Fossil Energy, Department of Energy (DOE).

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during July 2012, it issued Orders granting applications to import and export natural gas and vacating prior authority. These Orders are summarized in the attached appendix and may be found on the FE web site at *http://www.fossil.energy.gov/programs/gasregulation/authorizations/*

Orders-2012.html. They are also available for inspection and copying in the Office of Fossil Energy, Office of Natural Gas Regulatory Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on August 30, 2012.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

Appendix—DOE/FE Orders Granting Import/Export Authorizations

Order No.	Date issued	FE Docket No.	Authorization holder	Description of action
3126	07/19/12	12–64–NG	J. Aron & Company	Order granting blanket authority to import/export natural gas from/to Canada/Mexico and vacating prior authority, Order 2797.
3127	07/24/12	12–71–NG	Iberdrola Renewables, LLC	Order granting blanket authority to import/export natural gas from/to Canada/Mexico and vacating prior authority, Order 2792.

[FR Doc. 2012–22081 Filed 9–6–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13005–003]

Oliver Hydro LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 13005–003.

c. *Date filed:* December 14, 2011.

d. *Applicant:* Oliver Hydro LLC.

e. *Name of Project:* William Bacon Oliver Lock and Dam Hydroelectric Project.

f. *Location:* At the U.S. Army Corps of Engineers' (Corps) William Bacon Oliver Lock and Dam on the Black Warrior River, in Tuscaloosa County, Alabama. The project would occupy 8.7 acres of United States lands administered by the Corps' Mobile District.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact:* Brent Smith, Symbiotics LLC, 371 Upper Terrace, Suite 2, Bend, OR 97702; (541) 330–8779; or email at *brent.smith@symbioticsenergy.com.*

i. *FERC Contact:* Allan Creamer at (202) 502–8365, or via email at *allan.creamer@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. The proposed project would utilize the Corps' existing William Bacon Oliver Lock and Dam, and would consist of the following new facilities: (1) A forebay; (2) an intake structure; (3) a powerhouse containing two generating units with a total capacity of 11.72 megawatts (MW); (4) a 150-foot-long, 68-foot-wide tailrace; (5) a proposed 1.7-mile-long, 25 kilovolt (kV) transmission line; (6) a switchyard; and (7) appurtenant facilities. The proposed project would have an average annual generation of 42.6 GWh, and operate in a run-of-river mode utilizing surplus water from the William Bacon Oliver Lock and Dam, as directed by the Corps.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on, or before, the specified deadline date for the particular application.

All filings must: (1) Bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to

intervene must be served upon each representative of the applicant specified in the particular application.

o. Procedural schedule and final amendments: The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Scoping Document 1	August 2012.
Issue Scoping Document 2 (if necessary).	October 2012.
Notice of application is ready for environmental analysis.	February 2013.
Notice of availability of the EA.	October 2013.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22052 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14441–000]

Monroe City, UT: Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14441–000.

c. *Date filed:* July 27, 2012.

d. *Applicant:* Monroe City, Utah.

e. *Name of Project:* Monroe Cold Spring Hydroelectric Project.

f. *Location:* The proposed Monroe Cold Spring Hydroelectric Project would be located on a water supply pipeline for Monroe City in Sevier County, Utah. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. R. Kirk Nilsson, Monroe City, Utah, 10 North Main, Monroe, UT 84754, phone (435) 527–4621.

i. *FERC Contact:* Robert Bell, (202) 502–6062, *robert.bell@ferc.gov*.

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of the project:* The proposed Monroe Cold Spring Hydroelectric Project would consist of: (1) A proposed powerhouse containing one proposed generating unit with an installed capacity of 37 kilowatts; and (2) appurtenant facilities. The applicant estimates the project would have an average annual generation of 0.229 gigawatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14441, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

p. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS'', ''TERMS AND CONDITIONS'', or ''PRESCRIPTIONS''; (2) set forth in the heading, the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions, or prescriptions must set

forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: August 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22056 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 943–117]

Pubic Utility District No. 1 of Chelan County; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Application Type:* Non-project use of project lands and waters: water withdrawal.

b. *Project No.:* 943–117.

c. *Date Filed:* July 31, 2012.

d. *Applicant:* Public Utility District No. 1 of Chelan County, Washington.

e. *Name of Project:* Rock Island Hydroelectric Project.

f. *Location:* The proposed non-project use would be located on the Wenatchee River, near the confluence with the Columbia River.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ms. Michelle Smith, Public Utility District No. 1 of Chelan County, Licensing and Compliance Manager, 327 N. Wenatchee Ave., Wenatchee, WA 98801, (509) 661–4180.

i. *FERC Contact:* Ms. Andrea Claros, (202) 502–8171, *andrea.claros@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests, is September 17, 2012.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.gov/docs-filing/efiling.asp*. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments.

Please include the project number (P–943–117) on any comments, motions, or recommendations filed.

k. *Description of Request:* The Public Utility District No. 1 of Chelan County requests Commission approval to authorize Pioneer Water Users Association (PWUA) to construct a new point of water diversion within the Rock Island Hydroelectric Project boundary, on the Wenatchee River, adjacent to the upstream side of the State Road 285 bridge. PWUA proposes to construct a pump intake, fish screen and pipeline. The new point of diversion would pump a maximum of 4.9 million gallons per day, from May to September to upstream agricultural lands. The pipeline would connect to a pump house and approximately 4 miles of pressurized pipe, outside of the project boundary. This new system would replace an existing 54-mile open ditch irrigation system. PWUA also proposes to remove an in-river diversion structure located north of the town of Monitor. The purpose of the new water diversion is to improve aquatic habitat conditions and increase instream flows in the Wenatchee River.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22053 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13022–003]

Barren River Lake Hydro LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 13022–003.

c. *Date filed:* December 9, 2011, and amended on June 12, 2012.

d. *Applicant:* Barren River Lake Hydro LLC (Barren River Hydro)

e. *Name of Project:* Barren River Lake Dam Hydroelectric Project.

f. *Location:* At the U.S. Army Corps of Engineers' (Corps) Barren River Lake Dam on the Barren River, in Barren and Allen counties, Kentucky. The project would occupy 29.4 acres of United States lands administered by the Corps' Louisville District.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Brent Smith, Symbiotics LLC, 371 Upper Terrace, Suite 2, Bend, OR 97702; (541) 330–8779; or email at *brent.smith@symbioticsenergy.com*.

i. *FERC Contact:* Allan Creamer at (202) 502–8365, or via email at *allan.creamer@ferc.gov*.

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. The proposed project would utilize the Corps' existing Barren River Lake Dam, and would consist of the following new facilities: (1) An upper intake structure with a center elevation of 533 feet mean sea level (msl) and a lower intake structure with a center elevation of 507.5 feet msl, each equipped with trashracks having 2-inch clear spacing; (2) two 220-foot-long penstocks, connecting the intakes to a 50-foot-diameter, 100-foot-long gate shaft; (3) a 50-by-60-foot gate house; (4) a 850-foot-long power tunnel and a 14-foot-diameter, 950-foot-long penstock, leading to; (5) a 100-foot-long, 65-foot-wide powerhouse containing one vertical Kaplan turbine unit with a total capacity of 6.8 megawatts (MW); (6) a 12-foot-diameter regulating bypass valve connected to the west side of the powerhouse; (7) a 110-foot-long, 80-foot-wide tailrace; (8) a tailwater aeration system; (9) a proposed 0.6-mile-long, 12.5 kilovolt (kV) transmission line; (10) a switchyard; (11) two access roads leading to the gatehouse and powerhouse; and (12) appurtenant facilities. The proposed project would have an average annual generation of 25.8 GWh, and operate in a run-of-release mode utilizing surplus water from the Barren River Lake Dam, as directed by the Corps.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on, or before, the specified deadline date for the particular application.

All filings must: (1) Bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule and final amendments:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Scoping Document 1.	August 2012
Issue Scoping Document 2 (if necessary).	October 2012
Notice of application is ready for environmental analysis.	February 2013
Notice of availability of the EA.	October 2013

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

p. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention

deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22047 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14421–000]

Freedom Falls, LLC; Notice of Application Accepted for Filing, Intent To Waive Scoping, and Soliciting Motions to Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption from Licensing.

b. *Project No.:* 14421–000.

c. *Date filed:* June 1, 2012.

d. *Applicant:* Freedom Falls, LLC.

e. *Name of Project:* Freedom Falls Hydroelectric Project.

f. *Location:* On Sandy Stream, in the Town of Freedom, Waldo County, Maine. The project would not occupy lands of the United States.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Anthony P. Grassi, Freedom Falls, LLC, 363 Belfast Road, Camden, ME 04843, (207) 236–4663.

i. *FERC Contact:* Samantha Davidson, (202) 502–6839 or *samantha.davidson@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/ferconline.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. The proposed Freedom Falls Hydroelectric Project would consist of: (1) An existing 90-foot-long, 12-foot-high concrete-capped stone masonry dam with a 25-foot-long, 10-foot-high spillway with two vertical lift sluice gates and a crest elevation of 452.5 feet mean sea level (msl); (2) an existing 1.6-acre impoundment with a normal maximum water surface elevation of 453.0 feet msl; (3) a new intake structure equipped with an 8-foot-high, 5-foot-wide trashrack that would be modified to have 1-inch clear bar spacing, and a 3-foot-high, 4.75-foot-wide slide gate; (4) a new downstream American eel passage facility and working platform; (5) a new 60-foot-long, 30-inch-diameter steel penstock leading to; (6) an existing 20-foot-wide, by 30-foot-long generating room containing a new 38.3 kilowatt turbine-generator unit; (7) a new 20-foot-long, 5-foot-wide tailrace; (8) a new 30-foot-long, 110-volt transmission line; and (9) appurtenant facilities. The proposed project is estimated to generate an average of 66,000 kilowatt-hours annually.

m. Due to the project works already existing and the limited scope of proposed rehabilitation of the project site described above, the applicant's close coordination with federal and state agencies during the preparation of the application, completed studies during pre-filing consultation, and agency recommended preliminary terms and conditions, we intend to waive scoping and expedite the exemption process. Based on a review of the application, resource agency consultation letters including the preliminary 30(c) terms and conditions, and comments filed to date, Commission staff intends to prepare a single environmental assessment (EA). Commission staff determined that the issues that need to be addressed in its EA have been adequately identified during the pre-filing period, which included a public meeting and site visit, and no new issues are likely to be identified through additional scoping. The EA will consider assessing the potential effects of project construction and operation on geology and soils, aquatic, terrestrial, threatened and endangered species, recreation and land use, aesthetic, and cultural and historic resources.

n. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or

motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE,'' ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' or ''COMPETING APPLICATION;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22046 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP12–501–000; PF12–5–000]

Florida Gas Transmission Company, LLC, Florida Gas Transmission Company, LLC; Notice of Application

Take notice that on August 16, 2012, Florida Gas Transmission Company, LLC (FGT), 5051 Westheimer Road, Houston, Texas 77056, filed an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act and parts 157 of the Commission's to: (1) Replace approximately 1,618 feet of 36-inch diameter pipeline used to render transportation services under Subpart G of Part 284 of the Commission's regulations, 18 CFR part 284 (2012); and (2) the issuance of a certificate of public convenience and necessity to construct, modify, and operate pipeline, and ancillary facilities to replace the abandoned facilities (I–595 Replacement Project). The purpose of the I–595 Replacement Project is designed to resolve direct conflicts with the Florida Department of Transportation's construction of a mechanically stabilized earth wall and other encroachments in FGT's easement along State Road 91 in Broward County, Florida by the Florida Department of Transportation/Florida Turnpike Enterprise (FDOT/FTE), which is part of the I–595 Express Corridor Improvements Project (FDOT/FTE Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The total estimated cost for the proposed I–595 Replacement Project is approximately $24.7 million. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Stephen Veatch, Senior Director of Certificates & Tariffs, Florida Gas Transmission Company, LLC, 5051 Westheimer Road, Houston, Texas, 77056, or call (713) 989–2024, or fax (713) 989–1176, or by email *Stephen.Veatch@sug.com.*

On January 11, 2012, the Commission staff granted the Applicants' request to utilize the Pre-Filing Process and assigned Docket No. PF12–5–000 to staff activities involved the I–595 Replacement Project. Now as of the filing the August 16, 2012 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP12–501–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy

regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Comment Date: 5 p.m. Eastern Time on September 20, 2012.

Dated: August 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22045 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF12–15–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Intent To Prepare an Environmental Assessment for the Planned Virginia Southside Expansion Project; Request for Comments on Environmental Issues and Notice of Public Scoping Meeting

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Virginia Southside Expansion Project (Project) involving construction and operation of facilities by Transcontinental Gas Pipe Line Company, LLC (Transco) in Pittsylvania, Halifax, Charlotte, Mecklenburg, and Brunswick Counties, Virginia. The Commission will use this EA in its decision-making process to determine whether the Project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the Project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on October 1, 2012.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend the FERC public scoping meetings scheduled for the Project as follows:

Tuesday, September 18, 2012

Beginning at 6:30 p.m., Brian's Restaurant (upstairs room), 625 East Atlantic Ave., South Hill, VA 23970

Wednesday, September 19, 2012

Beginning at 6:30 p.m., Fairfield Inn & Suites Conference Suite, 1120 Bill Tuck Highway, South Boston, VA 24592

Thursday, September 20, 2012

Beginning at 6:30 p.m., Olde Dominion Agricultural Conference Center, 19783 US Hwy 29 S, Suite G, Chatham, VA 24531

The public meetings are designed to provide you with more detailed information and another opportunity to offer your comments on the planned project. Transco representatives will be present one hour before each meeting to describe their proposal, present maps, and answer questions. Interested groups and individuals are encouraged to attend the meetings and to present comments on the issues they believe should be addressed in the EA. A transcript of each meeting will be made so that your comments will be accurately recorded.

This notice is being sent to the Commission's current environmental mailing list for this Project. State and local government representatives should notify their constituents of this planned Project and encourage them to comment on their areas of concern. If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Planned Project

Transco plans to expand its existing South Virginia Lateral by constructing 98.6 miles of new 24-inch-diameter pipeline to provide additional natural gas transportation to markets in southern Virginia and northern North Carolina. The planned Project would provide an additional 250,000 dekatherms per day (dt/day) of natural gas transportation capability from Transco's pooling point [1] in Mercer County, New Jersey to its interconnection with East Tennessee Natural Gas Pipeline in Rockingham County, North Carolina. It would also transport natural gas to the Virginia Electric and Power Company's proposed 1,300-megawatt power station in Brunswick County, Virginia.

The Project would include construction and operation of the following facilities:

- Approximately 91.4 miles of new 24-inch-diameter natural gas pipeline collocated with the existing South Virginia Lateral in Pittsylvania, Halifax, Charlotte, Mecklenburg, and Brunswick Counties, Virginia;
- Approximately 7.2 miles of new 24-inch-diameter greenfield natural gas pipeline located in Brunswick County, Virginia;
- One new compressor station in Pittsylvania County, Virginia;
- Line heaters at the terminus of the Brunswick Lateral;
- Modifications to valves and meter stations at 12 facilities along the existing South Virginia Lateral;
- Modifications to existing Compressor Station 205 to allow bi-directional flow on Transco's mainline in Mercer County, New Jersey; and
- Other appurtenant and ancillary facilities.

The general location of the Project facilities is shown in Appendix 1.[2]

Transco plans to initiate construction of the Project in the third quarter of 2014 and complete construction during the third quarter of 2015. The construction schedule would be driven by the need to complete construction of the Project by the planned time for initial operation of the Virginia Electric and Power Company proposed 1,300-megawatt power station, which is not under the jurisdiction of the FERC.

Land Requirements for Construction

Construction of the planned facilities would disturb about 2,040 acres of land for the pipeline and aboveground facilities. Following construction, Transco would maintain about 140 acres for permanent operation of the Project's facilities; the remaining acreage would be restored and revert to former uses.

[1] Aggregation of gas from several natural gas supply points to a single point where gas can be sent to market.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

Over 90 percent of the proposed new pipeline would be collocated with the existing South Virginia Lateral, maximizing the use of previously disturbed right-of-way to the extent practicable.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned Project under these general headings:

- Geology and soils;
- Water resources;
- Wetlands and vegetation;
- Fish and wildlife;
- Threatened and endangered species;
- Land use, recreation, and visual resources;
- Air quality and noise;
- Cultural resources;
- Socioeconomics;
- Reliability and safety; and
- Cumulative environmental impacts.

We will also evaluate possible alternatives to the planned Project or portions of the Project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have begun to contact federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section beginning on page 6.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this Project to formally cooperate with us in the preparation of the EA.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Currently the U.S. Army Corps of Engineers Norfolk and Wilmington Districts have expressed their intention to participate as a cooperating agency in the preparation of the EA to satisfy their NEPA responsibilities related to this Project.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Virginia Department of Historic Resources, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Project's potential effects on historic properties.[5] We will define the Project-specific Area of Potential Effect in consultation with the State Historic Preservation Officer (SHPO) as the Project develops. On natural gas facility projects, the Area of Potential Effect at a minimum encompasses all areas subject to ground disturbance (examples include the construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this Project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the planned facilities and the environmental information provided by Transco. This preliminary list of issues may change based on your comments and our analysis:

- Potential impacts on perennial and intermittent waterbodies, including waterbodies with federal and/or state designations/protections;
- Evaluation of temporary and permanent impacts on wetlands and the development of appropriate mitigation;
- Potential impacts to fish and wildlife habitat, including potential impacts to federally and state-listed threatened and endangered species;
- Potential effects on prime farmland and erodible soils;
- Potential visual effects of the aboveground facilities on surrounding areas;
- Potential impacts and potential benefits of construction workforce on local housing, infrastructure, public services, and economy; and
- Impacts on air quality and noise associated with construction and operation of the Project.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC, on or before October 1, 2012. This is not your only public input opportunity; please refer to the Environmental Review Process flow chart in Appendix 2.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number (PF12–15–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature located on the Commission's Web site (*www.ferc.gov*) under the link

[3] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature located on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for Project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the Project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned Project.

Copies of the completed EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (Appendix 3).

Becoming an Intervenor

Once Transco files its application with the Commission, you may want to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the Project.

Additional Information

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF12–15). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: August 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22044 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2457–038]

Public Service Company of New Hampshire; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PAD And Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2457–038.

c. *Dated Filed:* July 2, 2012.

d. *Submitted By:* Public Service Company of New Hampshire (PSNH).

e. *Name of Project:* Eastman Falls Hydroelectric Project.

f. *Location:* On the Pemigewasset River in the city of Franklin and the towns of Hill, Sanbornton, Bristol, and New Hampton, within Merrimack and Belknap Counties, New Hampshire. The project does not affect federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Mr. Curtis R. Mooney; Project Manager, PSNH; 780 North Commercial Street, Manchester, NH 03105–0330; (603) 669–4000.

i. *FERC Contact:* Samantha Davidson at (202) 502–6839 or email at samantha.davidson@ferc.gov.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating PSNH as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. PSNH filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

All filings with the Commission must include on the first page, the project name (Eastman Falls Hydroelectric Project) and number (P–2457–038), and bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by October 30, 2012.

p. Although our current intent is to prepare an environmental assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date: Wednesday, September 19, 2012.

Time: 1:00 p.m. (EST).

Location: Franklin City Hall Opera House, 316 Central Street, Franklin, NH, 03235.

Phone: (603) 934–1901.

Evening Scoping Meeting

Date: Wednesday, September 19, 2012.

Time: 7:00 p.m. (EST).

Location: Franklin City Hall Opera House, 316 Central Street, Franklin, NH, 03235.

Phone: (603) 934–1901.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at *http://www.ferc.gov*, using the ''eLibrary'' link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Site Visit

The potential applicant and Commission staff will conduct a site visit of the project on Tuesday, September 18, 2012, starting at 11:00 a.m. All participants should meet at the Eastman Falls dam, located at 215 North Main Street, Franklin, NH 03235. All participants are responsible for their own transportation. Anyone with questions about the site visit should contact Mr. Curtis Mooney at (603) 744–5841 (ext. 5841) or curtis.mooney@nu.com on or before September 12, 2012.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public records of the project.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22054 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Attendance at the Western Electricity Coordinating Council Board of Directors Meeting

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission and/or Commission staff may attend the following meeting:

Western Electricity Coordinating Council Board of Directors Strategic Planning Session, 155 North 400 West, Suite 200, Salt Lake City, Utah 84013.

September 6, 2012 (1:00 p.m.–5:00 p.m.)
September 7, 2012 (8:30 a.m.–12:00 p.m.)

Further information regarding this meeting may be found at: *http://www.wecc.biz/committees/BOD/default.aspx.*

Dated: August 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22055 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14379–000]

North Star Hydro Services CA, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On March 30, 2012, North Star Hydro Services CA, LLC, Oklahoma, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Prosser Creek Dam Hydropower Project (project) to be located on Prosser Creek, a tributary of the Truckee River, near the town of Truckee, Nevada County, California. The project would affect federal lands and facilities administered by the Bureau of Reclamation (Bureau). The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize the existing facilities that include: the Bureau's 163-foot-high, earthfill, Prosser Creek dam; and a double 95-foot-high by 530-foot-long concrete primary outlet structure. No modifications would be made to the existing intake structure.

The proposed project would include: (1) Two Kaplan turbines generating 3.5 megawatts; (2) a 46-foot-wide by 120-foot-long by 30-foot-high powerhouse with an attached 75-foot-long by 24-foot-wide control room/cable gallery; (3) a 50- to 75-foot-long tailrace; and (4) a 69-kilovolt transmission line interconnecting to an existing transmission line 0.5 mile from the project site. The annual energy output would be approximately 3.8 gigawatthours.

Applicant Contact: David Holland, North Star Hydro Services CA, LLC, 1110 West 131st Street South, Jenks, Oklahoma 74037; phone (918) 398–0233.

FERC Contact: Carolyn Templeton; phone: (202) 502–8785.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14379) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22048 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14399–000]

North Star Hydro Services CA, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Competing Applications

On March 30, 2012, North Star Hydro Services CA, LLC, Oklahoma, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Boca Dam Hydropower Project (project) to be located on Little Truckee River, a tributary of the Truckee River, near the town of Truckee, Nevada County, California. The project would affect federal lands and facilities administered by the Bureau of Reclamation (Bureau). The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize existing facilities that include: the Bureau's 93-foot-high, earthfill, Boca dam; and double 50 inch, 530-feet-long steel pipes, serving as the primary outlet structure. No modifications would be made to the existing intake structure.

The proposed project would include: (1) One Kaplan turbine generating 1.7 megawatts; (2) an 86-foot-wide by 80-foot-long by 30-foot-high powerhouse with an attached 22-foot-wide by 80-foot-long control/office room; (3) an 80- to 125- foot-long tailrace; and (4) a 69-kilovolt transmission line interconnecting to an existing transmission line 0.25 mile southeast from the project site. The annual energy output would be approximately 4.6 gigawatthours.

Applicant Contact: David Holland, North Star Hydro Services CA, LLC, 1110 West 131st Street South, Jenks, Oklahoma 74037; phone (918) 398–0233.

FERC Contact: Carolyn Templeton; phone: (202) 502–8785.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14399) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 31, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–22051 Filed 9–6–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9004–9]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 08/27/2012 through 08/31/2012

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

SUPPLEMENTARY INFORMATION: Starting October 1, 2012, EPA will not accept paper copies or CDs of EISs for filing purposes; all submissions on or after October 1, 2012 must be made through e-NEPA.

While this system eliminates the need to submit paper or CD copies to EPA to meet filing requirements, electronic submission does not change requirements for distribution of EISs for public review and comment. To begin using e-NEPA, you must first register with EPA's electronic reporting site—*https://cdx.epa.gov/epa_home.asp*

EIS No. 20120286, Final EIS, BR, WA, Odessa Subarea Special Study, Columbia Basin Project, To Replace Groundwater Currently Used for Irrigation, Grant, Adams, Walla Walla and Franklin Counties, WA, Review Period Ends: 10/09/2012, Contact: Candace McKinley 509–575–5848 ext. 603.

EIS No. 20120287, Final EIS, FHWA, TX, Grand Parkway (State Highway 99) Segment C Construction, From US 59 to State Highway (SH) 288, USACE Section 404 Permit, Funding, Fort Bend and Brazoria Counties, TX, Review Period Ends: 10/09/2012, Contact: Gregory S. Punske 512–536–5900.

EIS No. 20120288, Final Supplement, USFS, OR, North Fork Burnt River Mining, New Information and Clarification of Previous Analyses, Whitman Ranger District, Wallowa-Whitman National Forest, Baker County, OR, Review Period Ends: 10/09/2012, Contact: Sophia Millar 541–263–1735.

EIS No. 20120289, Final EIS, USFS, SD, Calumet Project Area, Multiple Resources Management Actions, Black Hills National Forest, Mystic Ranger District, Pennington County, SD, Review Period Ends: 10/09/2012, Contact: Jon Swansfield 605–343–1567.

EIS No. 20120290, Final EIS, USACE, TX, Freeport Harbor Channel Improvement Project, Proposes to Deepen and Widen the Freeport Harbor Channel and Associated Turning Basins, Brazoria County, TX, Review Period Ends: 10/09/2012, Contact: Janelle Stokes 409–766–3039.

EIS No. 20120291, Draft EIS, BR, CO, Arkansas Valley Conduit and Long-Term Excess Capacity, Fryingpan-Arkansas Project, Bent, Chaffee, Crowley, El Paso Pueblo, Fremont, Kiowa, Otero, and Prowers Counties, CO, Comment Period Ends: 10/30/2012, Contact: J. Signe Snortland 701–221–1278.

EIS No. 20120292, Final EIS, USFS, CA, Giant Sequoia National Monument, Sequoia National Forest Plan Amendment, Tulare, Kerns, Fresno Counties, CA, Review Period Ends: 10/09/2012, Contact: Annette Fredette 559–784–1500, ext. 1138.

EIS No. 20120293, Final EIS, USFS, NM, Taos Ski Valley's 2010 Master Development Plan—Phase 1 Projects, Questa Ranger District, Carson National Forest, Taos County, NM, Review Period Ends: 10/09/2012, Contact: Audrey Nes Kuykendall 575–758–6212.

EIS No. 20120294, Draft EIS, USN, OR, Naval Weapons Systems Training Facility Boardman, Military Readiness Activities, OR, Comment Period Ends: 11/06/2012, Contact: Amy Burt 360–396–0924.

EIS No. 20120295, Draft Supplement, AFS, ID, Scriver Integrated Restoration Project, Updated and Additional Information, Identifying Permits, Licenses and Entitlements that were not identified in the DEIS, Improve Watershed Conditions by Reducing Road-Related Impacts to Wildlife, Fish, Soil, and Water Resources and Restoration of 2010 Forest Plan Vegetation Conditions, Emmett Ranger District, Boise National Forest, Boise and Valley Counties, ID, Comment Period Ends: 10/22/2012, Contact: Randall Hayman 208–373–4157.

Amended Notices

EIS No. 20100440, Draft EIS, USFS, MT, Warm Springs Habitat Enhancement Project, Restoring and Promoting Key Wildlife Habitat Components by Managing Vegetation, Reducing Fuels, and Promoting a more Resilient Fire Adapted Ecosystem, Helena Ranger District, Helena National Forest, Jefferson County, MT, Comment Period Ends: 10/22/2012, Contact: Liz Van Genderen 406–495–3749. Revision to FR Notice Published 11/12/2010; The U.S. Department of Agriculture's Forest Service is reopening the Comment period to end 10/22/2012 due to errata on page 321 of the DEIS.

EIS No. 20120214, Draft Supplement, NPS, 00, Yellowstone National Park Draft Winter Use Plan, Addressing the Issue of Oversnow Vehicle Use in the Interior of the Park, Implementation, WY, MT and ID, Comment Period Ends: 10/09/2012, Contact: David Jacob 303987–6970. Revision to FR Notice Published 07/06/2012; The

U.S. Department of the Interior's National Park Service is reopening the comment period to end 10/09/2012.

Dated: September 4, 2012.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2012–22080 Filed 9–6–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 12–1400]

Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Commission announces the next meeting date, time, and agenda of its Consumer Advisory Committee (Committee). The purpose of the Committee is to make recommendations to the Commission regarding matters within the jurisdiction of the Commission and to facilitate the participation of all consumers in proceedings before the Commission.

DATES: The next meeting of the Committee will take place on Friday, September 21, 2012, 2:00 p.m. to 4:00 p.m., in the Commission's Meeting Room, TW–C305.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Consumer and Governmental Affairs Bureau, (202) 418–2809 (voice or TTY), or email *Scott.Marshall@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document DA 12–1400 released August 24, 2012, announcing the agenda, date and time of the Committee's next meeting.

Meeting Agenda

At its September 21, 2012 meeting, it is expected that the Committee will consider one recommendation from its Broadband Working Group regarding broadband adoption; two recommendations from the Committee's Consumer Empowerment Group regarding text spamming and third-party wireless shutdowns; two recommendations from the Universal Service Working Group regarding Lifeline outreach and affordable calling from prisons; and one recommendation from the Consumer Complaints Task Force regarding the Commission's telephone IVR and web complaint systems. The Committee may also consider other recommendations from its working groups, and may also receive briefings from FCC staff and outside speakers on matters of interest to the Committee. A limited amount of time will be available on the agenda for questions and comments from the public. Meetings of the Committee are also broadcast live with open captioning over the Internet from the FCC Live Web page at *www.fcc.gov/live/.*

The public may ask questions of presenters via email at *livequestions@fcc.gov*, or via Twitter using the hashtag #fcclive. In addition, the public may also follow the meeting on Twitter @fcc or via the Commission's Facebook page at *www.facebook.com/fcc.* Alternatively, written comments to the Committee may be sent to: Scott Marshall, Designated Federal Officer of the Committee, at the address provided above.

The meeting is open to the public and the site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, assistive listening devices, and Braille copies of the agenda and handouts will be provided on site.

Other reasonable accommodations for people with disabilities are available upon request. The request should include a detailed description of the accommodation needed and contact information. Please provide as much advance notice as possible; last minute requests will be accepted, but may be impossible to fill. Send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Federal Communications Commission.

Mark Stone,

Deputy Bureau Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–21878 Filed 9–6–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 24, 2012.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Brian Darold Petersen,* Livingston, Montana; to retain at least 25 percent of the voting shares of Lakeside Bank Holding Company, and thereby indirectly retain voting shares of Lakeside State Bank, both in New Town, North Dakota, and McKenzie County Bank, Watford City, North Dakota.

Board of Governors of the Federal Reserve System, September 4, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–22035 Filed 9–6–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Full Committee Meeting.

Time And Date:

September 20, 2012 9 a.m.–3 p.m. EST
September 21, 2012 10 a.m.–1:50 p.m. EST

Place: U.S. Department of Health and Human Services, Hubert Humphrey Building, Rm. 705–A, Washington, DC 20201.

Status: Open.

Purpose: At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the morning of the first day the Committee will hear updates from the Department (HHS), the Centers for Medicare and Medicaid Services (CMS), and the Office of the National Coordinator (ONC). There will also be discussion of items for approval: (1) Report on Data Stewardship for Community Health Data; and after the lunch break, (2) recommendation letter

on Code Sets, Operating Rules and Administrative Simplification. In addition, a status update will be given on NCVHS's Working Group on Data Access and Use; and the Committee will deliberate briefly on follow-up from the August 9th Executive Subcommittee Strategic Planning Session.

The agenda for the morning of the second day will consist of a review of the final action items discussed on the first day; and reports from the Subcommittees. After lunch, the Committee will be briefed on de-identification methods for Open Health data. Once the full Committee adjourns, NCVHS's Working Group on Data Access and Use will convene to discuss anticipated work products and logistical plans. Further information will be provided on the NCVHS Web site at *http://www.ncvhs.hhs.gov/*.

The times shown above are for the full Committee meeting. Subcommittee breakout sessions are scheduled for late in the afternoon on the first day and in the morning prior to the full Committee meeting on the second day. Agendas for these breakout sessions will be posted on the NCVHS Web site (URL below) when available.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: August 29, 2012.

James Scanlon,

Deputy Assistant Secretary for Planning and Evaluation, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2012–22102 Filed 9–6–12; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Nominations for Membership on the Secretary's Advisory Committee on Human Research Protections

AGENCY: Office for Human Research Protections, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

AUTHORITY: 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended. The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. appendix 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The Office for Human Research Protections (OHRP), a program office in the Office of the Assistant Secretary for Health, Department of Health and Human Services (HHS), is seeking nominations of qualified candidates to be considered for appointment as members of the Secretary's Advisory Committee on Human Research Protections (SACHRP). SACHRP provides advice and recommendations to the Secretary, HHS, and the Assistant Secretary for Health on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. SACHRP was established by the Secretary, HHS, on October 1, 2002. OHRP is seeking nominations of qualified candidates to fill two positions on the Committee membership that will be vacated during the 2013 calendar year.

DATES: Nominations for membership on the Committee must be received no later than October 9, 2012.

ADDRESSES: Nominations should be mailed or delivered to Dr. Jerry Menikoff, Director, Office for Human Research Protections, Department of Health and Human Services, 1101 Wootton Parkway, Suite 200; Rockville, MD 20852. Nominations will not be accepted by email or by facsimile.

FOR FURTHER INFORMATION CONTACT: Julia Gorey, Executive Director, SACHRP, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, telephone: 240–453–8141. A copy of the Committee charter and list of the current members can be obtained by contacting Ms. Gorey, accessing the SACHRP Web site at *www.hhs.gov/ohrp/sachrp,* or requesting via email at *sachrp@osophs.dhhs.gov*.

SUPPLEMENTARY INFORMATION: The Committee provides advice on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. Specifically, the Committee provides advice relating to the responsible conduct of research involving human subjects with particular emphasis on special populations such as neonates and children, prisoners, the decisionally impaired, pregnant women, embryos and fetuses, individuals and populations in international studies, investigator conflicts of interest and populations in which there are individually identifiable samples, data or information.

In addition, the Committee is responsible for reviewing selected ongoing work and planned activities of the OHRP and other offices/agencies within HHS responsible for human subjects protection. These evaluations may include, but are not limited to, a review of assurance systems, the application of minimal research risk standards, the granting of waivers, education programs sponsored by OHRP, and the ongoing monitoring and oversight of institutional review boards and the institutions that sponsor research.

Nominations: The OHRP is requesting nominations to fill two positions for voting members of SACHRP. Two positions will become vacant in March, 2013. Nominations of potential candidates for consideration are being sought from a wide array of fields, including, but not limited to: Public health and medicine, behavioral and social sciences, health administration, and biomedical ethics. To qualify for consideration of appointment to the Committee, an individual must possess demonstrated experience and expertise in any of the several disciplines and fields pertinent to human subjects protection and/or clinical research.

The individuals selected for appointment to the Committee can be invited to serve a term of up to four years. Committee members receive a stipend and reimbursement for per diem and any travel expenses incurred for attending Committee meetings and/or conducting other business in the interest of the Committee. Interested applicants may self-nominate.

Nominations should be typewritten. The following information should be included in the package of material submitted for each individual being

nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (i.e., specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee; (2) the nominator's name, address, daytime telephone number, and the home and/or work address, telephone number, and email address of the individual being nominated; and (3) a current copy of the nominee's curriculum vitae. Federal employees should not be nominated for consideration of appointment to this Committee.

The Department makes every effort to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that individuals from a broad representation of geographic areas, women and men, ethnic and minority groups, and the disabled are given consideration for membership on HHS Federal advisory committees. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

Individuals who are selected to be considered for appointment will be required to provide detailed information regarding their financial holdings, consultancies, and research grants or contracts. Disclosure of this information is necessary in order to determine if the selected candidate is involved in any activity that may pose a potential conflict with the official duties to be performed as a member of SACHRP.

Dated: August 31, 2012.

Jerry Menikoff,

Director, Office for Human Research Protections, Executive Secretary, Secretary's Advisory Committee on Human Research Protections.

[FR Doc. 2012–22103 Filed 9–6–12; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10003]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection.

Title of Information Collection: Notice of Denial of Medical Coverage (or Payment); *Use:* In the July 6, 2012, **Federal Register** (77 FR 40064), the Centers for Medicare and Medicaid Services (CMS) published a 60-day notice regarding the information collection request approved under 0938–0829. However, due to technical difficulties, the documents associated with the information collection request were not made available to the public until August 14, 2012. Because of the technical difficulties, CMS is republishing the notice to allow the public to have a full 60-day comment period.

Section 1852(g)(1)(B) of the Social Security Act (SSA) requires Medicare health plans to provide enrollees with a written notice in understandable language that explains the plan's reasons for denying a request for a service or payment for a service the enrollee has already received. The written notice must also include a description of the applicable appeals processes. Regulatory authority for this notice is set forth in Subpart M of Part 422 at 42 CFR 422.568, 422.572, 417.600(b), and 417.840.

Section 1932 of the Social Security Act (SSA) sets forth requirements for Medicaid managed care plans, including beneficiary protections related to appealing a denial of coverage or payment. The Medicaid managed care appeals regulations are set forth in Subpart F of Part 438 of Title 42 of the CFR. Rules on the content of the written denial notice can be found at 42 CFR 438.404.

This notice combines the existing Notice of Denial of Medicare Coverage with the Notice of Denial of Payment and includes optional language to be used in cases where a Medicare health plan enrollee also receives full Medicaid benefits that are being managed by the Medicare health plan. *Form Number:* CMS–10003 (OCN: 0938–0829). *Frequency:* Occasionally. *Affected Public:* Private Sector (business or other for-profits, not-for-profit institutions). *Number of Respondents:* 665. *Total Annual Responses:* 6,960,410. *Total Annual Hours:* 1,159,604. (For policy questions regarding this collection contact Gladys Wheeler at 410–786–0273. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *November 6, 2012:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ___, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: September 4, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–22087 Filed 9–6–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Health Information Technology Implementation

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of Noncompetitive Replacement of the Award to Southwest Virginia Community Health Systems, Virginia.

SUMMARY: HRSA will be transferring the American Recovery and Reinvestment Act (ARRA) (section 330 of the Public Health Service Act) Health Information Technology Implementation for Health Center Controlled Networks (HCCN) funds originally awarded to Southwest Virginia Community Health Systems (SVCHS), to support the implementation of a HCCN in the state of Virginia to enhance the quality and efficiency of primary and preventive care as a safety net through the effective use of Health Information Technology (HIT).

SUPPLEMENTARY INFORMATION: *Former Grantee of Record:* Southwest Virginia Community Health Systems (SVCHS).

Original Period of Grant Support: June 1, 2010, to May 31, 2012.

Replacement Awardee: Harrisonburg Community Health Center (HCHC).

Amount of Replacement Award: $951,240.

Period of Replacement Award: The period of support for the replacement award is July 1, 2012, to March 31, 2013.

Authority: Section 330 of the Public Health Service Act, 42 U.S.C. 245b.

CFDA Number: 93.703.

Justification for the Exception to Competition

The former grantee, SVCHS, relinquished the grant due to financial and organizational challenges. In the effort to preserve the opportunity to advance information technology resources of Virginia's medically underserved communities, HCHC has demonstrated capacity to fulfill the expectations of the original grant award and plans to work closely with the Community Care Network of Virginia (CCNV), to complete the grant project and to plan for a smooth transition of the grant. HCHC has been a HRSA funded health center since 2008 and is a well-established organization with sound fiscal and grants management operations. The transfer of these funds will ensure full implementation of the grant, which will enhance the state of Virginia's ability to improve the quality and efficiency of primary and preventive care as a safety net through the effective use of health information technology.

In order to ensure a timely implementation of an HCCN in the state of Virginia as originally awarded, this replacement award will not be competed.

FOR FURTHER INFORMATION CONTACT: Ms. Suma Nair via phone at (301) 443–7587, or via email at *SNair1@hrsa.gov.*

Dated: August 30, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–22009 Filed 9–6–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request: Cognitive Testing of Instrumentation and Materials for the Population Assessment of Tobacco and Health (PATH) Study

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on May 23, 2012, page 30540 and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: Cognitive Testing of Instrumentation and Materials for Population Assessment of Tobacco and Health (PATH) Study. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The PATH study will establish a population-based framework for monitoring and evaluating the behavioral and health impacts of regulatory provisions implemented as part of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) by the Food and Drug Administration (FDA). NIDA is requesting generic approval from OMB for cognitive testing of the PATH study's instrumentation, supporting materials, consent forms, and methods of administration (e.g., computer assisted personal interviews [CAPI], audio computer assisted self-interviews [ACASI], web-based interviews). Cognitive testing of these materials and methods will help to ensure that their design and content are valid and meet the PATH study's objectives. Additionally, results from cognitive testing will inform the feasibility (scientific robustness), acceptability (burden to participants and study logistics) and cost of the information collection to help minimize its estimated cost and public burden.

Frequency of Response: Annual [As needed on an on-going and concurrent basis].

Affected Public: Individuals and Households. *Type of Respondents:* Youth (ages 12–17) and Adults (ages 18+). The annual reporting burden for the screening of respondents for the PATH study cognitive testing is presented in Table 1, and the annual reporting burden for the PATH study cognitive testing is presented in Table 2. The annualized cost to respondents for participating in screening for PATH study cognitive testing is estimated at: $6,632; and the annualized cost to respondents for participating in PATH study cognitive testing is estimated at: $20,346. There are no capital, operating or maintenance costs.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN FOR SCREENING OF PATH STUDY COGNITIVE TESTING RESPONDENTS

Screening for respondents	Type of respondent	Number of respondents	Responses per respondent	Hours per response	Annual hour burden
Screener	Youth	1000	1	1⁹⁄₆₀	167

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN FOR SCREENING OF PATH STUDY COGNITIVE TESTING RESPONDENTS—Continued

Screening for respondents	Type of respondent	Number of respondents	Responses per respondent	Hours per response	Annual hour burden
	Adult	2000	1	10/60	333
Total		3000			500

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN SUMMARY—COGNITIVE TESTING OF INSTRUMENTATION AND FORMS FOR THE PATH STUDY

Instrument/form to be tested	Type of respondent	Number of respondents	Responses per respondent	Hours per response	Annual hour burden
Forms to support data collection*	Adult	200	1	1 30/60	300
Assent forms for participation in PATH study.	Youth	200	1	1 30/60	300
Consent forms for participation in PATH study.	Adult	200	1	1 30/60	300
PATH study questionnaires	Youth	100	1	1 30/60	150
	Adult	300	1	1 30/60	450
Total		1000			1500

* For example, letters, mailing envelopes, PATH study brochures, instructions for collection of biospecimens.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Kevin P. Conway, Ph.D., Deputy Director, Division of Epidemiology, Services, and Prevention Research, National Institute on Drug Abuse, 6001 Executive Blvd., Room 5185; 301–443–8755; email *PATHprojectofficer@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: August 30, 2012.

Glenda P. Conroy,

Executive Officer (OM Director), NIDA.

[FR Doc. 2012–22107 Filed 9–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2012–0055]

Homeland Security Advisory Council

AGENCY: The Office of Policy, DHS.

ACTION: Notice of partially closed Federal Advisory Committee meeting.

SUMMARY: The Homeland Security Advisory Council (HSAC) will meet in person and members of the public may participate by conference call on September 25, 2012. The two-day meeting will be partially closed to the public.

DATES: The HSAC will meet on Monday, September 24, 2012, from 1 p.m. to 4:45 p.m. EDT. This portion of the meeting will be closed. On Tuesday, September 25, 2012, the HSAC will meet from 8 a.m. to 9:45 a.m. in closed session. The meeting will be open to the public from 10 a.m. to 11:15 a.m. and then meet in closed session from 11:15 a.m. to 12:45 p.m.

ADDRESSES: Written comments must be submitted and received by September 21, 2012. Comments must be identified by Docket No. DHS–2012–0055 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 282–9207.
- *Mail:* Homeland Security Advisory Council, Department of Homeland Security, Mailstop 0450, 245 Murray Lane SW., Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and DHS–2012–0055, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the DHS Homeland Security Advisory Council, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Becca Sharp, Executive Director, at *hsac@dhs.gov* or 202–447–3135.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App.

The HSAC provides organizationally independent, strategic, timely, specific and actionable advice and recommendations for the consideration of the Secretary of the Department of Homeland Security on matters related to homeland security. The Council is comprised of leaders of local law enforcement, first responders, state and local government, the private sector, and academia.

The HSAC will meet in open session on Tuesday, September 25, 2012, from 10 a.m. to 11:15 a.m. to receive a briefing from the Chief of Staff of the U.S. Citizenship and Immigration Service on its deferred action for the childhood arrivals program. The HSAC will also receive a report from the Sustainability and Efficiency Task Force, review and discuss the task forces' report, and formulate recommendations for the Department.

The HSAC will meet in closed session on Monday, September 24 from 1 p.m. to 4:45 p.m. and Tuesday, September 25 from 8 a.m. to 9:45 a.m., and from 11:15 a.m. to 12:45 p.m. In the closed sessions, the HSAC will receive sensitive operational briefings and updates from senior DHS leadership on the following issues: The strategic implementation plan to counter violent extremism domestically; the current threat environment; evolving threats in cyber security; Transportation Security Administration operations; DHS transition planning; and U.S. Coast Guard counterterrorism efforts around the world.

Basis for Partial-Closure: In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that the meeting requires closure as the disclosure of the information would not be in the public interest.

The HSAC will receive briefings on domestic and international threats to the homeland from DHS Intelligence and Analysis and other senior leadership, and a briefing on the Transportation Security Administration's (TSA) airport security program that will include lessons learned, and screening techniques associated with airport security. Specifically, there will be material presented regarding the latest viable threats against the United States, and how DHS and other Federal agencies plan to address those threats. Under 5 U.S.C. 552b(c)(7)(E), disclosure of that information could reveal investigative techniques and procedures not generally available to the public, allowing those with interests against the United States to circumvent the law. Additionally, under 5 U.S.C. 552b(c)(9)(B), disclosure of these techniques and procedures could frustrate the successful implementation of protective measures designed to keep our country safe.

Members will also be provided a briefing from the U.S. Coast Guard on counterterrorism efforts being made around the world, operational overview of the Department's transition planning efforts focused on national security, and the current strategic implementation plan of the Counter Violent Extremism Domestically. Providing this information to the public would provide terrorists with a road map regarding the Department's plan to counter their actions, and thus, allow them to take different actions to avoid counterterrorism efforts. Under 5 U.S.C. 552b(c)(9)(B), disclosure of this plan could frustrate the successful implementation of measures designed to counter terrorist acts and likely to significantly frustrate implementation of a proposed agency action. Lastly, members will receive a briefing on evolving threats in cyber security. This will include lessons learned and potential vulnerabilities of infrastructure assets, as well as potential methods to improve the Federal response to a cyber attack. Disclosure of this information would be a road map to those who wish to attack our infrastructure, and hence, would certainly frustrate the successful implementation of preventive and counter measures to protect our cyber and physical infrastructure. Therefore, this portion of the meeting is required to be closed under U.S.C. 552b(c)(9)(B).

Public Participation: Members of the public will be in listen-only mode. The public may register to listen in on this HSAC meeting via conference call using the afore-mentioned procedures. Each individual must provide his or her full legal name, email address and phone number no later than 5 p.m. EDT on September 20, 2012, to a staff member of the HSAC via email at *HSAC@dhs.gov* or via phone at (202) 447–3135. HSAC conference call details and the Sustainability and Efficiency Task Force report will be provided to interested members of the public at the time they register and at their request.

Identification of Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact the HSAC as soon as possible.

Dated: September 4, 2012.

Becca Sharp,

Executive Director, Homeland Security Advisory Council, DHS.

[FR Doc. 2012–22065 Filed 9–6–12; 8:45 am]

BILLING CODE 9910–9M–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4081–DR; Docket ID FEMA–2012–0002]

Mississippi; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4081–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* August 30, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

Adams, Claiborne, Franklin, Jefferson, Kemper, Leake, Neshoba, Newton, Noxubee, Scott, Simpson, Smith, Warren, and Winston Counties and the Mississippi Band of Choctaw Indians for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22105 Filed 9–6–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* August 30, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 29, 2012.

The parishes of Caldwell, Catahoula, Claiborne, Concordia, East Carroll, Evangeline, Jackson, Lafayette, La Salle, Lincoln, Madison, Richland, St. Landry, Tensas, Union, West Carroll, and West Feliciana for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

The parishes of Beauregard, Bossier, and Caddo for emergency protective measures (Category B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22108 Filed 9–6–12; 8:45 am]

BILLING CODE 9111–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4081–DR; Docket ID FEMA–2012–0002]

Mississippi; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA–4081–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* August 29, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 29, 2012, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Mississippi resulting from Hurricane Isaac beginning on August 26, 2012, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Mississippi.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program in the designated areas and Hazard Mitigation throughout the State.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Terry L. Quarles, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Mississippi have been designated as adversely affected by this major disaster:

Amite, Attala, Carroll, Clarke, Copiah, Covington, Forrest, George, Greene, Grenada, Hancock, Harrison, Hinds, Holmes, Jackson, Jasper, Jefferson Davis, Jones, Lamar, Lauderdale, Lawrence, Lincoln, Madison, Marion, Montgomery, Pearl River, Perry, Pike, Rankin, Stone, Walthall, Wayne, Wilkinson, and Yazoo Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All counties within the State of Mississippi are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22101 Filed 9–6–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4080–DR; Docket ID FEMA–2012–0002]

Louisiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–4080–DR), dated August 29, 2012, and related determinations.

DATES: *Effective Date:* August 29, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 29, 2012, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Louisiana resulting from Hurricane Isaac beginning on August 26, 2012, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Louisiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program, in the designated areas and Hazard Mitigation throughout the State.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Gerard M. Stolar, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Louisiana have been designated as adversely affected by this major disaster:

Acadia, Allen, Ascension, Assumption, Avoyelles, Cameron, East Baton Rouge, East Feliciana, Franklin, Iberia, Iberville, Jefferson, Jefferson Davis, Lafourche, Livingston, Morehouse, Natchitoches, Orleans, Ouachita, Plaquemines, Pointe Coupee, Rapides, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, and West Baton Rouge Parishes for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance.

All parishes within the State of Louisiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–22104 Filed 9–6–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0033]

Agency Information Collection Activities: Report of Medical Examination and Vaccination Record, Form I–693; Revision of a Currently Approved Collection

ACTION: 30-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on June 18, 2012, at 77 FR 36285, allowing for a 60-day public comment period. USCIS received one submission from one commenter in response to the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 9, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the OMB USCIS Desk Officer. Comments may be submitted to: DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via email at *uscisfrcomment@dhs.gov*, to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov* and via the Federal eRulemaking Portal Web site at *http://www.Regulations.gov* under e-Docket ID number USCIS–2006–0074. When submitting comments by email, please make sure to add 1615–0033 in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do*, or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies

should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Report of Medical Examination and Vaccination Record.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–693; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households.* The information on the application will be used by USCIS in considering the eligibility for adjustment of status under 8 CFR parts 209, 210, 245 and 245a and 8 CFR 214.15.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 565,180 responses at 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,412,950 annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone 202–272–1470.

Dated: September 4, 2012.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–22093 Filed 9–6–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5601–N–35]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: August 30, 2012.

Ann Marie Oliva,

Deputy Assistant Secretary (Acting) for Special Needs.

[FR Doc. 2012–21837 Filed 9–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCON05000 L16100000.DS0000]

Notice of Availability of the Draft Resource Management Plan Amendment and the Draft Environmental Impact Statement for Oil and Gas Development for the White River Field Office in Garfield, Moffat and Rio Blanco Counties, CO

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan (RMP) Amendment and a Draft Environmental Impact Statement (EIS) for the White River Field Office (WRFO) and by this notice is announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft RMP Amendment/Draft EIS within 90 days following the date the Environmental Protection Agency publishes this notice in the **Federal Register**. The BLM will announce future meetings or hearings and any other public participation activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the WRFO Oil and Gas Development Draft RMP Amendment/Draft EIS by any of the following methods:

- *Email: Colorado_WROGEIS@blm.gov.*
- *Fax:* 970–878–3805.
- *Mail:* BLM—WRFO, 220 East Market Street, Meeker, Colorado 81641.

Copies of the WRFO Oil and Gas Development Draft RMP Amendment/Draft EIS are available in the WRFO at the above address or on the WRFO Web site at: *http://www.blm.gov/co/st/en/fo/wrfo.html.*

FOR FURTHER INFORMATION CONTACT: For further information contact Heather Sauls, Planning and Environmental Coordinator, telephone 970–878–3855; see address above; email *hsauls@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is

available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM prepared the WRFO Oil and Gas Development Draft RMP Amendment/Draft EIS to evaluate and amend, as necessary, the current management decisions for oil and natural gas resources within the WRFO planning area. The current management decisions for oil and natural gas resources are described in the *White River Record of Decision and Approved Resource Management Plan (RMP)* (approved July 1, 1997), as amended (*1997 WRFO RMP*).

The Draft RMP Amendment/Draft EIS addresses public lands and resources managed by the WRFO. The WRFO planning area includes approximately 2.7 million acres of BLM, National Park Service, U.S. Forest Service, State, and private lands. It is located in northwestern Colorado, primarily in Rio Blanco County, with additional tracts located in Moffat and Garfield counties. Within the WRFO planning area, the BLM administers approximately 1.5 million surface acres and 2.2 million acres of Federal oil and natural gas mineral (subsurface) estate. Surface management decisions made as a result of this Draft RMP Amendment/Draft EIS will apply only to the BLM-administered lands in the WRFO planning area.

The WRFO has determined that an amendment to the current RMP is necessary to address an unanticipated increase in the rate of oil and natural gas development. The *1997 WRFO RMP* projected and analyzed a Reasonable Foreseeable Development (RFD) Scenario of 1,100 oil and natural gas wells, with 10 acres of disturbance per well, over a 20-year period. The 2007 RFD Scenario indicates that the potential exists to develop as many as 21,200 new wells on 2,556 multiple well pads, resulting in 31,257 acres of associated surface disturbance. The purpose of the WRFO Oil and Gas Development Draft RMP Amendment/Draft EIS is to provide effective management direction for public lands administered by the WRFO that analyzes oil and natural gas exploration and development activities in excess of levels evaluated in the *1997 WRFO RMP*. During the development of the Draft RMP Amendment/Draft EIS, the BLM reviewed the decisions contained in the *1997 WRFO RMP*. Many decisions contained in the *1997 WRFO RMP* are adequate and remain valid. The BLM intends to carry those management decisions forward, in addition to the management decisions approved through this Draft RMP Amendment/Draft EIS process. None of the alternatives in this amendment considers the creation of new special designations, management of lands with wilderness characteristics, or changes which areas are open or closed to oil and natural gas leasing. These allocation decisions made in the *1997 WRFO RMP* are still valid.

The Draft RMP Amendment/Draft EIS evaluates four alternatives in detail, including the No Action Alternative (Alternative A) and three action alternatives (Alternatives B, C and D). The BLM identified Alternative C as the preferred alternative. However, it is important to note that identification of a preferred alternative does not constitute a commitment or decision in principle, and there is no requirement to select the preferred alternative in the Record of Decision. Various parts of separate alternatives analyzed in the draft can also be ''mixed and matched'' to develop a complete alternative in the final EIS. Alternative A would retain the current management goals, objectives, and direction specified in the *1997 WRFO RMP,* updating the 20-year development projection. Alternative B incorporates a managed development approach that offers operator incentives for concentrated development (e.g., year-round drilling instead of timing limitations if development does not exceed a particular threshold) and emphasizes conservation and protection of other resources by limiting the duration and overall extent of oil and natural gas development. Its focus is on protection of resources and sustaining the ecological integrity of habitats for all priority plant, wildlife, and fish species, particularly the habitats needed for conserving and recovering threatened and endangered plant and animal species. Alternative C also incorporates a managed development approach, but higher disturbance thresholds, more exceptions and modifications to lease stipulations could be granted compared to Alternative B. Alternative C emphasizes a balance among competing human interests, land uses, and natural and cultural resource value conservation by strategically addressing demands across the landscape. Alternative D emphasizes maximizing oil and natural gas production while maintaining the basic protection needed to sustain resources afforded by applicable laws, regulations, and BLM policy.

The BLM used public scoping comments to help identify planning issues to direct the formulation of alternatives and to frame the scope of analysis in the Draft RMP Amendment/Draft EIS. The BLM also used the scoping process to introduce the public to preliminary planning criteria, which set limits on the scope of the Draft RMP Amendment/Draft EIS.

Major issues considered in the Draft RMP Amendment/Draft EIS include air and water quality, biological resources, wild horse and rangeland management, fire management, special designations, cultural and paleontological resources, American Indian concerns, recreation management, social and economic values, utility corridors, roads and travel management, and visual resource management among others. The Draft RMP Amendment/Draft EIS details a range of possible mitigation measures to reduce impacts to Greater Sage-Grouse and their habitat. In addition, the BLM Colorado Northwest District is preparing a Greater Sage-Grouse EIS that may result in a subsequent WRFO RMP amendment prescribing additional protections for the Greater Sage-Grouse.

Please note that public comments and information submitted including names, street addresses, and email addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (8:00 a.m. to 4:00 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire Comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2

Helen M. Hankins,

BLM Colorado State Director.

[FR Doc. 2012–21939 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD070000 L16100000 DT0000]

Notice of Availability of the Proposed Imperial Sand Dunes Recreation Area Management Plan and California Desert Conservation Area Plan Amendment/Final Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Proposed Recreation Area Management Plan (RAMP) and California Desert Conservation Area (CDCA) Plan Amendment/Final Environmental Impact Statement (EIS), for the Imperial Sand Dunes Recreation Area (ISDRA), and by this notice is announcing its availability.

DATES: BLM planning regulations provide that any person who meets the conditions as described in the regulations may protest the BLM's Proposed RAMP and CDCA Plan Amendment/Final EIS. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS have been sent to affected Federal, State, and local government agencies; Native American Tribes; and to other stakeholders. Copies of the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS are available for public inspection at the BLM El Centro Field Office, 1661 South Fourth Street, El Centro, CA 92243. Interested persons may also review the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS on the Internet at *http://www.blm.gov/ca/elcentro.* All protests must be in writing and mailed to the following addresses:

Regular Mail: BLM Director (210), Attention: Brenda Hudgens-Williams, P.O. Box 71383, Washington, DC 20024–1383.

Overnight Mail: BLM Director (210), Attention: Brenda Hudgens-Williams, 20 M Street SE., Room 2134LM, Washington, DC 20003.

If an appeal is taken, the notice of appeal must be filed in the BLM El Centro Field Office, 1661 South Fourth Street, El Centro, CA 92243, within 30 days of the decision.

FOR FURTHER INFORMATION CONTACT: For further information, contact Greg Hill, Project Manager, BLM El Centro Field Office, 1661 South Fourth, El Centro, CA 92243; by phone at 760–337–4400; or by email at *greg_hill@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Imperial Sand Dunes Recreation Area (ISDRA) and surrounding lands included in the planning area encompass approximately 215,000 acres of public lands managed by the BLM. The planning area is located in the southeastern portion of Imperial County, California. The 2005 Record of Decision for the 2003 RAMP was vacated by a U.S. District Court in September 2006. Portions of the biological opinion for the Peirson's milkvetch were also remanded to the Fish and Wildlife Service. The 2012 RAMP addresses this issue as well as others in the planning area.

The primary activities in the ISDRA include off-highway vehicle use and camping. The Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS has been developed through a collaborative planning process and considers eight alternatives. Issues addressed in the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS include: Recreation; transportation and public access; wildlife and botany (i.e. Peirson's milkvetch); cultural resources and paleontology; renewable energy; air and water resources; geology and soils; mineral resources; socioeconomics; public health and safety; and visual resources. The Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS includes strategies for protecting and preserving the recreational, biological, cultural, geological, educational, and scenic values for which the recreation area was established.

Eight alternatives were analyzed in the Proposed RAMP/Plan Amendment and FEIS. The ''no action'' alternative represents current management of the ISDRA. Seven additional ''action'' alternatives present reasonable, yet varying, management scenarios. The alternatives range from emphasizing maintenance of the naturalness of the ISDRA (by restricting some recreation uses) to emphasizing continued recreation uses, while still protecting the resources and values for which the area was established. The range of alternatives in the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS evaluates planning decisions brought forward from current BLM planning documents, including the California Desert Conservation Area Plan (1980) as amended.

Comments on the Draft RAMP/Plan Amendment and EIS received from the public and internal BLM review were considered and incorporated as appropriate into the proposed plan. Public comments resulted in a variety of clarifications and modifications throughout the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change the proposed land use plan decisions analyzed in the alternatives. Revisions made between the Draft RAMP/Plan Amendment and Draft EIS and the Proposed RAMP/Plan Amendment and FEIS include: Quantification of some management goals and objectives; clarification of multiple-use classes and visual resource management; consideration of lands with wilderness characteristics; modifications to alternatives regarding camping in the Dunebuggy Flats area; and modifications to implementation-level decisions to correctly categorize them as plan-level decisions or implementation actions.

The Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS also considers changes to Areas of Critical Environmental Concern (ACEC); the Plank Road, East Mesa, and North Algodones Dunes ACECs. The preferred alternative would retain the existing 416 acre Plank Road ACEC; reduce the East Mesa ACEC from 6,454 acres to 5,799 acres; and eliminate the North Algodones Dunes ACEC in order to remove conflicting management prescriptions between this ACEC and the North Algodones Dunes Wilderness.

Instructions for filing a protest with the Director of the BLM regarding the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS may be found in the ''Dear Reader'' Letter of the Proposed Imperial Sand Dunes RAMP and CDCA Plan Amendment/Final EIS and at 43 CFR 1610.5–2. Email and faxed protests will not be accepted unless the protesting party also provides the original letter by

either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the email or faxed protest as an advance copy, and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at 202–245–0028, and emails to *Brenda_Hudgens-Williams@blm.gov*.

All protests, including the follow-up letter to emails or faxes, must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above.

Before including your phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2, 43 CFR 1610.5

Thomas F. Zale,

Acting Field Manager, El Centro Field Office.

[FR Doc. 2012–21936 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ956000.L14200000.BJ0000.241A]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Arizona.

SUMMARY: The plats of survey of the described lands were officially filed in the Arizona State Office, Bureau of Land Management, Phoenix, Arizona, on the dates indicated.

SUPPLEMENTARY INFORMATION:

The Gila and Salt River Meridian, Arizona

The plat representing the survey of the west and north boundaries and a portion of the subdivisional lines, Township 3 South, Range 21 East, accepted August 20, 2012, and officially filed August 23, 2012, for Group 1090, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs, Western Regional Office.

The plat representing the dependent resurvey of portions of the south and east boundaries and portions of the subdivisional lines and the survey of portions of the east and north boundaries and portions of the subdivisional lines, Township 4 South, Range 21 East, accepted August 20, 2012, and officially filed August 23, 2012, for Group 1090, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs, Western Regional Office.

The plat representing the dependent resurvey of a portion of the east boundary of the San Carlos Indian Reservation and the survey of the west boundary, a portion of the north boundary and a portion of the subdivisional lines, Township 3 South, Range 22 East, accepted August 20, 2012, and officially filed August 23, 2012, for Group 1090, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs, Western Regional Office.

The plat representing the dependent resurvey of a portion of the east boundary of the San Carlos Indian Reservation, and the dependent resurvey of a portion of the south boundary and a portion of the subdivisional lines and a survey of a portion of the north boundary and a portion of the subdivisional lines, Township 4 South, Range 22 East, accepted August 20, 2012, and officially filed August 23, 2012, for Group 1090, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs, Western Regional Office.

A person or party who wishes to protest against any of these surveys must file a written protest with the Arizona State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona 85004–4427. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Stephen K. Hansen,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2012–22070 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L12200000.DF0000]

Notice of Public Meeting, Las Cruces District Resource Advisory Council Meeting, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM), Las Cruces District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting date is September 19, 2012, at the BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88005, from 7 a.m.–4 p.m. The public may send written comments to the RAC at the above address.

FOR FURTHER INFORMATION CONTACT: Rena Gutierrez, BLM Las Cruces District, 1800 Marquess Street, Las Cruces, NM 88005, 575–525–4338. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8229 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 10-member RAC advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in New Mexico. Planned agenda items include opening remarks from the District Manager, Prehistoric Trackways National Monument tour and briefing, Membership Update and Elections. A half-hour public comment period during which the public may address the Council will begin at 2:30 p.m. on September 19, 2012. All RAC meetings are open to the public. Depending on the number of individuals wishing to comment and

time available, the time for individual oral comments may be limited.

Bill Childress,

District Manager, Las Cruces.

[FR Doc. 2012–22068 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW164771]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW164771, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Source Energy, LLC, for competitive oil and gas lease WYW164771 for land in Park County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at 307–775–6176. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $159 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW164771 effective December 1, 2011, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Fluid Minerals Adjudication.

[FR Doc. 2012–22013 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW179119]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW179119, Wyoming

AGENCY: Bureau of Land Management, Interior

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Ellwood Exploration, LLC, for competitive oil and gas lease WYW179119 for land in Niobraba County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at 307–775–6176. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $159 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW179119 effective July 1, 2011, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. 2012–22026 Filed 9–6–12; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–11111; 2200–3200–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 11, 2012. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by September 24, 2012. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 14, 2012.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ARKANSAS

Saline County

Hyten, Charles ''Bullet'' Dean, House, 211 Main St., Benton, 12000804

Searcy County

Greenhaw, Mary, Memorial Methodist Episcopal Church South, 115 E. Nome St., Marshall, 12000805

Sebastian County

Belle Grove Historic District, Roughly bounded by N. 4th, N. 9th, N. B, & N. H Sts., Fort Smith, 12000806

Washington County

Walker Family Plot, 514 E. Rock St., Fayetteville, 12000807

CALIFORNIA

Contra Costa County

CA–CCO–548/H, Address Restricted, Restricted, 12000808

Los Angeles County

Boulevard Heights Historic District, 658–899 S. Bronson Ave., Los Angeles, 12000809
First Congregational Church of Long Beach, 241 Cedar Ave., Long Beach, 12000810
Yamashiro Historic District, 1999 N. Sycamore St., Los Angeles, 12000811

Sacramento County

Maydestone Apartments, 1001 15th St., Sacramento, 12000812

San Bernardino County

Ontario and San Antonio Heights Waiting Station, 1251 W. 24th St., Upland, 12000813

IOWA

Johnson County

Ranshaw, Samuel and Emma A., House, 515 W. Penn St., North Liberty, 12000814

Wapello County

Hotel Ottumwa, 107 E. 2nd St., Ottumwa, 12000815

KANSAS

Pratt County

Norden Bombsight Storage Vaults (World War II-Era Aviation-Related Facilities of Kansas) 305 Flint Rd., Pratt, 12000816

MARYLAND

Baltimore Independent city

Old Hamilton Library, 3006 Hamilton Ave., Baltimore (Independent City), 12000817

MASSACHUSETTS

Essex County

Pinkham, Lydia, House, 285 Western Ave., Lynn, 12000818 Norfolk County
North Bellingham Cemetery and Oak Hill Cemetery, Hartford Ave., Bellingham, 12000819

MISSOURI

Crawford County

Brickey, Peter, Farmstead (Cherokee Trail of Tears MPS), Address Restricted, Steelville, 12000820

NEW HAMPSHIRE

Grafton County

Perry, Norman and Marion, House, Address Restricted, Campton, 12000821

PENNSYLVANIA

Elk County

Irwintown Site, Address Restricted, Hallton, 12000822

SOUTH CAROLINA

Richland County

Powell, J. Davis, House, 1410 Shirley St., Columbia, 12000823

VIRGINIA

Fauquier County

Galemont, 5071 Galemont Ln., Broad Run, 12000824

A request for removal has been made for the following resources:

ARKANSAS

Faulkner County

Webb, Joe and Nina, House, 2945 Prince, Conway, 05001171

Jackson County

Rock Island Depot—Weldon, AR 17, Weldon, 92000621

Jefferson County

Williams Building, 418–420 N University, Pine Bluff, 10000833

Sevier County

Locke—Nall House, Off US 59/71 N of Lockesburg, Lockesburg, 89000340

[FR Doc. 2012–22096 Filed 9–6–12; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Veterans Retraining Assistance Program

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA sponsored information collection request (ICR) extension titled, ''Veterans Retraining Assistance Program,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before October 9, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: Information covered by this ICR supports implementation of the Veterans Retraining Assistance Program authorized in section 211 of the VOW to Hire Heroes Act of 2011 (Pub. L. 112–56). This benefit directs the Department of Veterans Affairs (VA), in cooperation with the DOL, to pay for up to 12 months of a training program in a high demand occupation for unemployed eligible veterans between the ages of 35 and 60 as determined by the DOL and VA. The program is to serve up to 45,000 veterans in fiscal year 2012 and up to 54,000 veterans from October 1, 2012, through March 31, 2014. The Act requires DOL to be the initial point of intake and to conduct preliminary eligibility determinations prior to linking applicants to the VA Application for VA Educational Benefits approved under OMB Control Number 2900–0154.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0491. The current approval is scheduled to expire on October 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review.

For additional information, see the related notice published in the **Federal Register** on May 24, 2012 (77 FR 31042).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0491. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Veterans Retraining Assistance Program.

OMB Control Number: 1205–0491.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 100,000.

Total Estimated Number of Responses: 100,000.

Total Estimated Annual Burden Hours: 8,333.

Total Estimated Annual Other Costs Burden: $0.

Dated: August 31, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22082 Filed 9–6–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Roof Control Plans for Underground Coal Mines

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) revision titled, ''Roof Control Plans for Underground Coal Mines,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before October 9, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: In order to prevent occupational injuries resulting from falls of roofs, faces, and ribs, which are a leading cause of injuries and death in underground coal mines, regulations 30 CFR 75.215 and 75.220 to 75.223 make it mandatory for all underground coal mine operators to develop and submit roof control plans to the MSHA for evaluation and approval. These plans are evaluated to determine if they are adequate for prevailing mining conditions.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0004. The current approval is scheduled to expire on September 30, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the Federal Register on April 27, 2012 (77 FR 25205).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the Federal Register. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0004. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Roof Control Plans for Underground Coal Mines.

OMB Control Number: 1219–0004.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 549.

Total Estimated Number of Responses: 3,151.

Total Estimated Annual Burden Hours: 15,564.

Total Estimated Annual Other Costs Burden: $8,185.

Dated: August 31, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–22089 Filed 9–6–12; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employment and Training Administration

National Farmworker Jobs Program (NFJP) Information Collection Forms; Comment Request for Regular Extension of Approval (With Revisions)

AGENCY: Employment and Training Administration (ETA), Department of Labor.

ACTION: Notice.

Overview Information

Comment Request for Regular Extension of approval (with revisions) for the National Farmworker Jobs Program (NFJP) information collection forms: the Grant Plan Narrative, the Budget Information Summary (BIS), ETA Form 9093, the Program Planning Summary (PPS), ETA Form 9094, the Program Status Summary (PSS), ETA Form 9095; the Workforce Investment Act Standardized Participant Record (WIASPR), and the Housing Assistance Summary (HAS), ETA Form 9164.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data supporting the NFJP (expires December 31, 2012). A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before November 6, 2012.

ADDRESSES: Submit written comments to: Amy Young, Employment and Training Administration, Office of Workforce Investment, 200 Constitution Avenue NW., Room C–4510, Washington, DC 20210. Telephone number: 202–693–3045 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Fax: 202–693–3015. Email: *nfjp@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by sending an email to *nfjp@dol.gov*, subject line: ETA NFJP Forms ICR copy.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Information Collection Review process, each grantee receiving NFJP funds for employment and training activities is required to submit the following:

- The BIS (ETA–9093) is submitted as part of the annual grant plan, and is used to collect information on how grant funds will be spent during the program year.
- The PPS (ETA–9094) is submitted as part of the annual grant plan, and is used to project the number of participants and the array of services to be provided for the program year.
- The PSS (ETA–9095) is submitted each quarter and is used to collect data on actual participant numbers and services. ETA has added a short section to Form 9095 to collect narrative information on grant activities.
- The WIASPR is submitted each quarter and collects individual participant records containing demographic, service, and outcome data on individuals who exit the program. Data from the WIASPR are used by ETA to calculate the common performance measures for entered employment, retention, and earnings.
- The HAS (ETA–9164), is a new quarterly reporting form for grantees receiving NFJP funds for housing assistance activities. This report will collect data on the number of individuals and families served and narrative information on grant activities.
- All NFJP grantees are required by regulation to submit a grant plan narrative covering the two-year grant period cycle. The grant plan narrative is a comprehensive service delivery plan and a projection of participant services and expenditures. ETA provides guidance to the grantees regarding the content of the annual plan narrative and submission requirements.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension with revisions.

Title: Reporting for the National Farmworker Jobs Program under Section 167 of Title I of the Workforce Investment Act.

OMB Number: 1205–0425.

Affected Public: State or local government agencies; not-for-profit organizations.

Form(s): Grant Plan Narrative, ETA Form 9093, ETA Form 9094, ETA Form 9095, ETA Form 9164, and WIASPR.

Total Estimated Number of Respondents: 294.

Frequency: Grant Plan Narrative, once per year; ETA Form 9093, once per year; ETA Form 9094, once per year; ETA Form 9095, once per quarter; ETA Form 9164, once per quarter; and WIASPR, once per quarter.

Total Annual Responses: 13,969.

Average Time per Response: ETA Form 9093, 15 hours; ETA Form 9094, 16 hours; ETA Form 9095, 17 hours; ETA Form 9164, 17 hours; and WIASPR, 2.25 hours.

Estimated Total Annual Burden Hours: 38,104.

Total Annual Burden Cost for Respondents: $577,275.

Data collection activities/forms	Estimated number of respondents	Frequency per year	Total annual responses	Average time per response (hours)	Estimated annual burden hours	Total annual burden cost
Plan Narrative	69	Annually (1)	69	20	1,380	$20,907
Budget Information Summary, ETA Form 9093	52	Annually (1)	52	15	780	11,817
Program Planning Summary, ETA Form 9094	52	Annually (1)	52	16	832	12,605
Program Status Summary, ETA Form 9095	52	Quarterly (4)	208	17	3,536	53,570
WIASPR individual records	*52	Quarterly (4)	13,520	2.25	30,420	460,863
Housing Assistance Summary, ETA Form 9164	17	Quarterly (4)	68	17	1,156	$17,513
Totals	294		13,969	87.25	38,104	577,275

*65 records per grantee.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 30th day of August, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–22076 Filed 9–6–12; 8:45 am]

BILLING CODE 4510–FN–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0068]

Japan Lessons-Learned Project Directorate Interim Staff Guidance JLD–ISG–2012–01; Compliance With Order EA–12–049, Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Japan Lessons-Learned Project Directorate interim staff guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is issuing the Final Japan Lessons-Learned Project Directorate Interim Staff Guidance (JLD–ISG), JLD–ISG–2012–01, ''Compliance with Order EA–12–049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events,'' Agencywide Documents Access and Management System (ADAMS) Accession No. ML12229A174. This JLD–ISG provides guidance and clarification to assist nuclear power reactor applicants and licensees with the identification of measures needed to comply with requirements to mitigate challenges to key safety functions. These requirements are contained in Order EA–12–049, ''Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events,'' (ADAMS Accession No. ML12054A736).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0068.

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0068. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The JLD–ISG–2012–01 is available under ADAMS Accession No. ML12229A174.
- NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 NRC's Interim Staff Guidance Web Site: Go to *http://www.nrc.gov/reading-rm/doc-collections/isg/japan-lessons-learned.html* and refer to JLD–ISG–2012–01.

FOR FURTHER INFORMATION CONTACT: Mr. Steven D. Bloom, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2431; email: *Steven.Bloom@nrc.gov.*

SUPPLEMENTARY INFORMATION:

II. Background Information

Interim staff guidance (ISG), Final Japan Lessons-Learned Project Directorate Interim Staff Guidance (JLD–ISG), JLD–ISG–2012–01, *''Compliance with Order EA–12–049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events,''* (ADAMS Accession No. ML12229A174) is being issued to describe to the public methods acceptable to the Nuclear Regulatory Commission (NRC) staff for complying with Order EA–12–049, ''Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately)'' (Order EA–12–049), issued March 12, 2012. This ISG endorses the methodologies described in the industry guidance document, Nuclear Energy Institute (NEI) 12–06, *Diverse and Flexible Coping Strategies (FLEX) Implementation Guide* (NEI 12–06), Revision 0 (ADAMS Accession No. ML12242A378) submitted on August 21, 2012. The ISG is not a substitute for the requirements in Order EA–12–049, and compliance with this ISG is not required.

The NRC issued Order EA–12–049 following the NRC staff's evaluation of the earthquake and tsunami, and resulting nuclear accident, at the Fukushima Dai-ichi nuclear power plant in March 2011. Order EA–12–049 requires all licensees and construction permit (CP) holders to develop a three-phase approach for mitigating beyond-design-basis external events. The initial phase requires the use of installed equipment and resources to maintain or restore core cooling, containment, and SFP cooling. The transition phase requires providing sufficient, portable,

onsite equipment and consumables to maintain or restore these functions until they can be accomplished with resources brought from off site. The final phase requires obtaining sufficient offsite resources to sustain those functions indefinitely. Order EA–12–049 also specified that the NRC staff would issue final interim staff guidance in August 2012 to provide additional details on an acceptable approach for complying with Order EA–12–049.

Numerous public meetings were held to solicit stakeholder input on the proposed requirement for mitigation strategies prior to issuance of Order EA–12–049. Following issuance of Order EA–12–049, several more public meetings were held with representatives from the NEI task force and public stakeholders to discuss development of the guidance for compliance with Order EA–12–049. On June 7, 2012 (77 FR 33779), the NRC requested public comments on draft JLD–ISG–12–01. The staff received comments from eight stakeholders which were considered in the development of the final JLD–ISG–12–01. The questions, comments and staff resolutions of those comments are contained in ''JLD–ISG–2012–01, Comment Resolution Rev.1'' which can be found in ADAMS as Accession No. ML12229A253.

Backfitting and Issue Finality

This ISG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' of 10 CFR. This ISG provides guidance on an acceptable method for implementing the requirements contained in Order EA–12–049, which was issued as ensuring adequate protection under the provisions of the backfit rule. Applicants and licensees may voluntarily use the guidance in JLD–ISG–2012–01 to demonstrate compliance with Order EA–12–049. Methods or solutions that differ from those described in this ISG may be deemed acceptable if they provide sufficient basis and information for the NRC staff to verify that the proposed alternative demonstrates compliance with Order EA–12–049.

Congressional Review Act

This interim staff guidance is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). OMB has found that this is a major rule in accordance with the Congressional Review Act.

Dated at Rockville, Maryland, this 29th day of August 2012.

For the Nuclear Regulatory Commission.

John D. Monninger,

Associate Director, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–22066 Filed 9–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0069]

Japan Lessons-Learned Project Directorate Interim Staff Guidance JLD–ISG–2012–02; Compliance With Order EA–12–050, Order Modifying Licenses With Regard to Reliable Hardened Containment Vents

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Japan Lessons-Learned Project Directorate interim staff guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is issuing the Final Japan Lessons-Learned Project Directorate Interim Staff Guidance (JLD–ISG), JLD–ISG–2012–02, ''Compliance with Order EA–12–050, Order Modifying Licenses With Regard to Reliable Hardened Containment Vents'' (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12229A475). This JLD–ISG provides guidance and clarification to assist nuclear power reactors applicants and licensees with the identification of measures needed to comply with requirements to mitigate challenges to key safety functions. These requirements are contained in Order EA–12–050, ''Order Modifying Licenses with Regard to Reliable Hardened Containment Vents'' (ADAMS Accession No. ML12054A696).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0069.

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0069. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The JLD–ISG–2012–02 is available under ADAMS Accession No. ML12229A475.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852
- *NRC's Interim Staff Guidance Web Site:* Go to *http://www.nrc.gov/reading-rm/doc-collections/isg/japan-lessons-learned.html* and refer to JLD–ISG–2012–02.

FOR FURTHER INFORMATION CONTACT: Mr. Robert J. Fretz, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1980; email: *Robert.Fretz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

II. Background Information

JLD–ISG–2012–02 is being issued to describe methods acceptable to the NRC staff for complying with Order EA–12–050, ''Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)'' (Order EA–12–050), issued March 12, 2012. The ISG is not a substitute for the requirements in Order EA–12–050, and compliance with this ISG not required.

The NRC issued Order EA–12–050 following the NRC staff's evaluation of the earthquake and tsunami, and resulting nuclear accident, at the Fukushima Dai-ichi nuclear power plant in March 2011. Order EA–12–050 requires licensees to implement requirements relating to reliable hardened venting systems at boiler water reactor (BWR) facilities with Mark I and Mark II containment designs. Order EA–12–050 also specified that the NRC staff would issue final interim staff guidance in August 2012 to provide additional information on acceptable approaches for complying with the Order.

Numerous public meetings were held to receive stakeholder input on the proposed requirements for reliable hardened vents prior to issuance of Order EA–12–050. Following issuance of the Order, additional public meetings were held with representatives from the BWR Owners' Group and public stakeholders to discuss development of the guidance for compliance with Order EA–12–050. On June 7, 2012 (77 FR 33777), the NRC requested public comments on draft JLD–ISG–12–02. The

staff received comments from five commenters which were considered in the development of the final JLD–ISG–12–02. The questions, comments and staff resolutions of those comments are contained in ''NRC Responses to Public Comments, Japan Lessons-Learned Project Directorate Interim Staff Guidance, JLD–ISG–2012–02: Compliance with Order EA–12–050, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents,'' which can be found in ADAMS as Accession No. ML122229A477.

Backfitting and Issue Finality

This ISG does not constitute backfitting as defined in Title 10 of the *Code of Federal Regulations* (10 CFR) 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' of 10 CFR. This ISG provides guidance on an acceptable method for implementing the requirements contained in Order EA–12–050, which was issued as ensuring adequate protection under the provisions of the backfit rule. Applicants and licensees may voluntarily use the guidance in JLD–ISG–2012–02 to demonstrate compliance with Order EA–12–050. Methods or solutions that differ from those described in this ISG may be deemed acceptable if they provide sufficient basis and information for the NRC staff to verify that the proposed alternative demonstrates compliance with Order EA–12–050.

Congressional Review Act

This interim staff guidance is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). OMB has found that this is not a major rule in accordance with the Congressional Review Act.

Dated at Rockville, Maryland, this 29th day of August 2012.

For the Nuclear Regulatory Commission.

John D. Monninger,

Associate Director, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–22078 Filed 9–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0067]

Japan Lessons-Learned Project Directorate Interim Staff Guidance JLD–ISG–2012–03; Compliance With Order EA–12–051, Order Modifying Licenses With Regard to Reliable Spent Fuel Pool Instrumentation

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Japan Lessons-Learned Project Directorate Interim Staff Guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is issuing the Final Japan Lessons-Learned Project Directorate (JLD) Interim Staff Guidance (ISG), JLD–ISG–2012–03, ''Compliance with Order EA–12–051, Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation'' (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12221A339). This JLD–ISG provides guidance and clarification to assist nuclear power reactors applicants and licensees with the identification of measures needed to comply with requirements to install enhanced spent fuel pool monitoring capability. These requirements are contained in Order EA–12–051, ''Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation,'' (ADAMS Accession No. ML12054A679).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0067.

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0067. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The JLD–ISG–2012–03 is available under ADAMS Accession No. ML12221A339.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852.
- *NRC's Interim Staff Guidance Web Site:* Go to *http://www.nrc.gov/reading-rm/doc-collections/isg/japan-lessons-learned.html* and refer to JLD–ISG–2012–03.

FOR FURTHER INFORMATION CONTACT: Mrs. Lisa M. Regner, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1906; email: *Lisa.Regner@nrc.gov.*

SUPPLEMENTARY INFORMATION:

II. Background Information

JLD–ISG–2012–03 is being issued to describe to the public methods acceptable to the Nuclear Regulatory Commission (NRC) staff for complying with Order EA–12–051, ''Order Modifying Licenses With Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)'' (Order EA–12–051), issued March 12, 2012. This ISG endorses with clarifications and exceptions, the methodologies described in the industry guidance document, Nuclear Energy Institute (NEI) 12–02, *Industry Guidance for Compliance with NRC Order EA–12–051, ''To Modify Licenses With Regard to Reliable Spent Fuel Pool Instrumentation''* (NEI 12–02), Revision 1 (ADAMS Accession No. ML122400399). The ISG is not a substitute for the requirements in Order EA–12–051, and compliance with this ISG is not required.

The NRC issued Order EA–12–051 following the NRC staff's evaluation of the earthquake and tsunami, and resulting nuclear accident, at the Fukushima Dai-ichi nuclear power plant in March 2011. Order EA–12–051 requires all licensees and construction permit (CP) holders to provide safety enhancements in the form of reliable spent fuel pool instrumentation for beyond-design-basis external events. Order EA–12–051 also specified that the NRC staff would issue final interim staff guidance in August 2012 to provide additional details on an acceptable approach for complying with Order EA–12–051.

Numerous public meetings were held to receive stakeholder input on the proposed requirement for spent fuel pool instrumentation enhancements prior to issuance of Order EA–12–051. Following issuance of Order EA–12–051, several more public meetings were held with representatives from the NEI task force and public stakeholders to discuss development of the guidance for

compliance with Order EA–12–051. On June 7, 2012 (77 FR 33780), the NRC requested public comments on draft JLD–ISG–12–03. The staff received comments from seven stakeholders, and these were considered in the development of the final JLD–ISG–12–03. The questions, comments and staff resolutions of those comments are contained in ''NRC Responses to Public Comments,'' for JLD–ISG–2012–03, which can be found in ADAMS at Accession No. ML122221A319.

Backfitting and Issue Finality

This ISG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' of 10 CFR. This ISG provides guidance on an acceptable method for implementing the requirements contained in Order EA–12–051, which was issued under an administrative exemption to the backfit rule and the issue finality requirements in 10 CFR 52.63 and 10 CFR Part 52, Appendix D, Paragraph VIII. Applicants and licensees may voluntarily use the guidance in JLD–ISG–2012–03 to demonstrate compliance with Order EA–12–051. Methods or solutions that differ from those described in this ISG may be deemed acceptable if they provide sufficient basis and information for the NRC staff to verify that the proposed alternative demonstrates compliance with Order EA–12–051.

Congressional Review Act

This interim staff guidance is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). OMB has found that this is not a major rule in accordance with the Congressional Review Act.

Dated at Rockville, Maryland, this 29th day of August 2012.

For the Nuclear Regulatory Commission.

John D. Monninger,

Associate Director, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–22069 Filed 9–6–12; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Hispanic Council on Federal Employment

AGENCY: Office of Personnel Management.

ACTION: Scheduling of Council Meeting.

SUMMARY: The Hispanic Council on Federal Employment (HCFE) will hold a meeting on Friday, September 21, 2012, at the time and location shown below. The Council is an advisory committee composed of representatives from Hispanic organizations and senior government officials. Along with its other responsibilities, the Council shall advise the Director of the Office of Personnel Management on matters involving the recruitment, hiring, and advancement of Hispanics in the Federal workforce. The Council is co-chaired by the Chief of Staff of the Office of Personnel Management and the Assistant Secretary for Human Resources and Administration at the Department of Veterans Affairs.

The meeting is open to the public. Please contact the Office of Personnel Management at the address shown below if you wish to present material to the Council at the meeting. The manner and time prescribed for presentations may be limited, depending upon the number of parties that express interest in presenting information.

DATES: September, 21st 2012, from 2:00–4:00 p.m.

Location: U.S. Department of the Interior, Secretary's Conference Room # 5160, 1849 C St. NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Veronica E. Villalobos, Director for the Office of Diversity and Inclusion, Office of Personnel Management, 1900 E St. NW., Suite 5H35, Washington, DC 20415. Phone (202) 606–0040 FAX (202) 606–2183 or email at *Jesse.Frank@opm.gov.*

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–22091 Filed 9–6–12; 8:45 am]

BILLING CODE 6325–46–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2012–46 and CP2012–55; Order No. 1458]

Product List Changes

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Express Mail, Priority Mail & First-Class Package Service Contract 1 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* September 10, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Express Mail, Priority Mail & First-Class Package Service Contract 1 to the competitive product list.[1] The Postal Service asserts that Express Mail, Priority Mail & First-Class Package Service Contract 1 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2012–46.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2012–55.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the

[1] Request of the United States Postal Service to Add Express Mail, Priority Mail & First-Class Package Service Contract 1 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, August 30, 2012 (Request).

contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective on the date that the Commission issues all regulatory approvals. *Id.* at 2. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2012–46 and CP2012–55 to consider the Request pertaining to the proposed Express Mail, Priority Mail & First-Class Package Service Contract 1 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than September 10, 2012. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Natalie Rea Ward to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2012–46 and CP2012–55 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Natalie Rea Ward is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than September 10, 2012.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–22021 Filed 9–6–12; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Express Mail, Priority Mail, & First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* September 7, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 30, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Express Mail, Priority Mail, & First-Class Package Service Contract 1 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–46, CP2012–55.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–22014 Filed 9–6–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30191]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

August 31, 2012.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of August 2012. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 25, 2012, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street NE., Washington, DC 20549–8010.

Dreyfus Connecticut Municipal Money Market Fund Inc.

[File No. 811–6014]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 28, 2012, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of approximately $922 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on August 15, 2012.

Applicant's Address: c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

Morgan Stanley Special Growth Fund

[File No. 811–6711]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Morgan Stanley Institutional Fund, Inc. and, on November 14, 2011, made a final distribution to its shareholders based on net asset value. Expenses of approximately $203,828 incurred in connection with the reorganization were paid by applicant.

Filing Dates: The application was filed on June 13, 2012, and amended on July 31, 2012.

Applicant's Address: c/o Morgan Stanley Investment Management Inc., 522 Fifth Ave., New York, NY 10036.

Thirty Eight Hundred Fund LLC

[File No. 811–22158]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant currently has a single beneficial owner, is not presently making an offering of securities and does not propose to make any offering of securities. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(1) of the Act.

Filing Dates: The application was filed on July 9, 2012, and amended on August 27, 2012.

Applicant's Address: 3800 Howard Hughes Parkway, Suite 900, 605 Third Ave., 2nd Floor, Las Vegas, NV 89169–0925.

Separate Account II of Integrity Life Insurance Company

[File No. 811–7134]

Separate Account II of National Integrity Life Insurance Company

[File No. 811–7132]

Western-Southern Life Assurance Company Separate Account 2

[File No. 811–8550]

Summary: Each Applicant seeks an order declaring that it has ceased to be an investment company. Each Applicant is a registered separate account that is organized as a unit investment trust. The management of each Applicant's depositor gave final authorization for the consolidation of the applicable Applicant with another registered separate account of the depositor on October 19, 2011. Each depositor bore all of the applicable merger expenses. Applicants have no assets, debts or any other liabilities. Applicants are not parties to any litigation or administrative proceeding and are not engaged in or intending to engage in any business activities.

Filing Dates: Each Applicant's application was filed on June 28, 2012 and amended on August 17, 2012.

Applicants' Address: 400 Broadway, Cincinnati, OH 45202.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22057 Filed 9–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30188; 812–13933]

Cash Account Trust, et al.; Notice of Application

August 31, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 17(a) of the Act.

Applicants: Cash Account Trust, on behalf of its series, Government & Agency Securities Portfolio and Money Market Portfolio; Cash Management Portfolio; Cash Reserve Fund, Inc., on behalf of its series, Prime Series; DWS Money Funds, on behalf of its series, DWS Money Market Prime Series; DWS Money Market Trust, on behalf of its series, DWS Money Market Series, Cash Management Fund, Cash Reserves Fund Institutional, and Daily Assets Fund Institutional; DWS Variable Series II, on behalf of its series, DWS Money Market VIP; and Investors Cash Trust, on behalf of its series, Treasury Portfolio, Central Cash Management Fund and DWS Variable NAV Money Fund (collectively, the ''DWS Funds''), Deutsche Investment Management Americas Inc. (''DIMA''), and Deutsche Bank Securities, Inc. (''DBSI'').

SUMMARY: *Summary of Application:* Applicants request an order to permit the Money Market Portfolios (as defined below) to engage in principal transactions in certain taxable money market instruments including repurchase agreements with DBSI.

DATES: *Filing Dates:* The application was filed on August 1, 2011, and amended on January 27, 2012, and July 20, 2012.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 24, 2012, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: the DWS Funds and DIMA, 345 Park Avenue, New York, NY 10154; DBSI, 60 Wall Street, New York, NY 10005.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, (202) 551–6879 or Mary Kay Frech, Branch Chief, (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The DWS Funds are each a Massachusetts business trust (or, in the case of Cash Reserve Fund Inc., a Maryland corporation), each is registered under the Act as an open-end management investment company, and each has one or more series that operate as money market funds subject to rule 2a–7 under the Act (''Rule 2a–7''). In addition to the DWS Funds and their series that operate as money market funds subject to Rule 2a–7, relief is requested for any other existing or future funds registered under the Act that operate as money market funds subject to Rule 2a–7 under the Act and are advised or subadvised by an Adviser (as defined below). All such investment companies and their series that operate as money market funds subject to Rule 2a–7 under the Act, including DWS Funds and their series, are referred to individually as a ''Money Market Portfolio'' and collectively as the ''Money Market Portfolios.'' Any Money Market Portfolios not existing as of the date of the application or that currently

do not intend to rely on the requested order are referred to individually as a ''Future Money Market Portfolio'' and collectively as the ''Future Money Market Portfolios.'' [1]

2. DIMA, a Delaware corporation and wholly owned subsidiary of Deutsche Bank Americas Holding Corporation, a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank A.G. (''DB''), is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). Each Money Market Portfolio has an investment advisory agreement with DIMA, pursuant to which DIMA provides investment advisory and management services. In addition to DIMA, applicants request relief for any other existing or future investment adviser registered under the Advisers Act which acts as investment adviser or sub-adviser to a DWS Fund and which controls, is controlled by, or is under common control (as defined in section 2(a)(9) of the Act) with DIMA (individually, a ''Future Adviser'' and collectively, the ''Future Advisers''). DIMA and the Future Advisers are referred to individually as an ''Adviser'' and collectively as the ''Advisers.'' [2]

3. DBSI, a Delaware corporation and wholly owned subsidiary of DB U.S. Financial Markets Holding Corporation, a wholly owned subsidiary of Taunus Corporation, which, as noted above, is a wholly owned subsidiary of DB, is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended (the ''1934 Act'').[3] DBSI, which is a primary dealer in U.S. Government securities, is currently one of the largest dealers in commercial paper, repurchase agreements and other money market instruments in the United States (such money market instruments and repurchase agreements collectively are referred to as ''Money Market Instruments''). Applicants believe that DBSI's extensive dealing in Taxable Money Market Instruments (as defined below) makes it a very significant source for both investment opportunities and information and expertise.[4]

4. Applicants state that DBSI and the Adviser are functionally independent of each other and operate as completely separate entities under the umbrella of DB. While each of these corporations is under common control, DBSI and the Adviser have their own separate officers and employees, are separately capitalized, and maintain their own books and records, except for one dual officer as more fully discussed in the application. In addition, the Adviser and DBSI operate on different sides of appropriate information barriers with respect to portfolio management activities and investment banking activities, and maintain physically separate offices.

5. Investment management decisions for the Money Market Portfolios are determined solely by the Adviser. The portfolio managers and other employees that are responsible for portfolio management for registered investment companies are employed solely by the Adviser (and not DBSI) and have lines of reporting responsibility solely within the Adviser. The compensation of persons assigned to the Adviser will not depend on the volume or nature of trades effected by the Adviser for the Money Market Portfolios with DBSI under the requested exemption, except to the extent that such trades may affect the profits and losses of DB and its subsidiaries as a whole.

6. Each Money Market Portfolio and Future Money Market Portfolio, consistent with its stated investment objectives and practices, may invest in Money Market Instruments. Practically all trading in Taxable Money Market Instruments takes place in over-the-counter markets consisting of groups of dealers that are primarily major securities firms or large commercial banks. Taxable Money Market Instruments are generally traded in lots of $1,000,000 or more on a net basis and do not normally involve either brokerage commissions or transfer taxes. The cost of portfolio transactions to the Money Market Portfolios consists primarily of dealer or underwriter spreads. Spreads vary among Money Market Instruments but generally spread levels are in the range of 1 to 5 basis points (.01% to .05%). In the Money Market Portfolios' experience, there is not a great deal of variation in the spreads quoted by the various dealers, except during turbulent market conditions.

7. The money market consists of elaborate communications networks among dealer firms, principal issuers of Taxable Money Market Instruments and principal institutional buyers of such instruments. Because the money market is a dealer market rather than an auction market, there is not a single obtainable price for a given instrument that generally prevails at any given time. A dealer acts either as ''agent'' on behalf of issuer clients or as ''principal'' for its own account. In either capacity, a dealer posts rates throughout its internal and external distribution networks that are intended to reflect ''market clearing price levels,'' as determined by the dealer. Only customers of dealers seeking to purchase Money Market Instruments have access to these postings.

8. Because of the variety of types of Taxable Money Market Instruments, the money market tends to be somewhat segmented. The markets for the various types of instruments will vary in terms of price, volatility, liquidity and availability. Although the rates for the different types of instruments tend to fluctuate closely together, there may be significant differences in yield among the various types of instruments, and even within a particular instrument category, depending upon the maturity date and the credit quality of the issuer. Moreover, from time to time segmenting exists within Money Market Instruments with the same maturity date and rating. The segmenting is based on such factors as whether the issuer is an industrial or financial company, whether the issuer is domestic or foreign and whether the securities are asset-backed or unsecured. Because dealers tend to specialize in certain types of Taxable Money Market Instruments, the particular needs of a potential buyer or seller in terms of type of security, maturity or credit quality may limit the number of dealers who can provide optimum pricing and execution. Hence, with respect to any given type of instrument, there may be only a few dealers that have the instrument available and can be in a position to quote an acceptable price.

9. DBSI is one of the world's largest dealers in Taxable Money Market Instruments, ranking among the top firms in each of the major markets and product areas, as more fully discussed in the application. For the calendar year ended 2011, DBSI ranked seventh in terms of market share in commercial paper, conducting business with 51% of

[1] Any Money Market Portfolio that currently intends to rely on the requested order is named as an applicant. Any other Money Market Portfolio that relies on the order in the future will comply with the terms and conditions of the application.

[2] Any Adviser that currently intends to rely on the requested order is named as an applicant. Any other Adviser that relies on the order in the future will comply with the terms and conditions of the application. Each Future Adviser will be registered as an investment adviser under the Advisers Act.

[3] DBSI also is registered as an investment adviser under the Advisers Act. For purposes of the application, the relief sought applies to DBSI as broker-dealer only. The requested relief will not extend to any investment company advised or sub-advised by DBSI.

[4] The term ''Taxable Money Market Instruments'' refers to taxable securities which are eligible for purchase by money market funds under Rule 2a–7, including short-term U.S. Government securities, short-term U.S. Governmental agency securities, bank money market instruments, bank notes, commercial paper and other short-term fixed income instruments, including appropriate medium-term notes, asset-backed floating rate notes, and repurchase agreements.

the market. Applicants state that DBSI plays a relatively significant role in the repurchase agreement market and that DBSI's market position is among the ten leading dealers. For the calendar year ended 2010, DBSI's average daily repurchase agreement sales volume was $165 billion. The U.S. Treasury market consists of U.S. government obligations that are sold through public auctions. According to the Federal Reserve Bank of New York, there are currently only 21 primary dealers. DBSI's primary dealer desk actively participates in the U.S. Treasury market and is a leading primary dealer. For the calendar year ended 2011, DBSI bid on average for 8% to 20% of all the Treasury securities auctioned and received on average 2% to 8% of the primary distribution of Treasury securities. DBSI actively transacts in securities issued by U.S. Government agencies and government sponsored enterprises (''GSEs''). DBSI serves as a primary distributor for each of the GSEs for their unsecured debt and mortgage-backed securities. DBSI ranked sixth in underwriting primary issuances of agency and GSE securities in 2011 with a market share of 6.3%. DBSI is also one of the leading participants in the market for medium-term notes (''MTNs''). MTNs are offered continuously in public or private offerings, with maturities beginning at nine months. MTNs represent a significant portion of the longer-term money market investment alternatives because commercial paper is not issued with maturities greater than nine months. DBSI is a very significant dealer in the MTN market, and through December 31, 2011, ranked as the tenth largest manager or co-manager of MTNs, bank notes and CD programs in the United States with a 5.5% market share.

10. Applicants state that in recent years mergers and acquisitions in the investment banking and commercial banking industries have caused dealers that were formerly independent and competing with one another to combine their operations. As a result, there is a substantially smaller number of major dealers who are active in the money market than was the case a decade ago. Applicants also state that the reduction in the number of participants has generally decreased the liquidity available in the market, since fewer dealers will make a market in any particular security. Applicants further state that, as the number of dealers with whom the Money Market Portfolios can transact business has decreased, it has become even more important for the Money Market Portfolios to have access to all of the major dealers in Money Market Instruments in order to diversify each Money Market Portfolio's investments, to maintain portfolio liquidity, and to increase opportunities for obtaining best price and execution with respect to portfolio trades. In addition, applicants state that, given the relative significance of DBSI in the market for Money Market Instruments in which the Money Market Portfolios invest, not having access to DBSI may place the Money Market Portfolios at a competitive disadvantage.

11. Subject to the general oversight of the board of directors/trustees of each DWS Fund (each a ''Board''), the Adviser is responsible for portfolio decisions and executing transactions in Money Market Instruments. The Money Market Portfolios have no obligation to deal with any dealer or group of dealers in the execution of their portfolio transactions. When placing orders, the Adviser must attempt to obtain the best net price and the most favorable execution of its orders. In doing so, it takes into account such factors as price, the size, type and difficulty of the transaction involved and the dealer's general execution and operational facilities. For repurchase agreements in particular, the Adviser places great emphasis on the creditworthiness of the counterparty.

Applicants' Legal Analysis

1. Applicants request an order pursuant to sections 6(c) and 17(b) of the Act exempting certain transactions from the provisions of section 17(a) of the Act to permit DBSI, acting as principal, to sell Taxable Money Market Instruments to, or purchase Taxable Money Market Instruments from, the Money Market Portfolios, and to engage in repurchase agreement transactions with the Money Market Portfolios, subject to the conditions set forth below.

2. Section 17(a) of the Act generally prohibits an affiliated person or principal underwriter of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company, or any company controlled by such registered company, any security or other property. Because DBSI and the Adviser are under common control of DB, DBSI and the Adviser are affiliated persons of each other within the meaning of section 2(a)(3)(C) of the Act. Accordingly, DBSI could be deemed to be an affiliated person of an affiliated person of the Money Market Portfolios, because the Adviser, as the investment adviser of the Money Market Portfolios, could be deemed to be an affiliated person of the Money Market Portfolios under section 2(a)(3)(E) of the Act. Thus, section 17(a) would prohibit the Money Market Portfolios from selling or purchasing Taxable Money Market Instruments to or from DBSI to the extent DBSI is deemed an affiliated person of an affiliated person of the Money Market Portfolios.

3. Section 17(b) of the Act provides that the Commission, upon application, may exempt a transaction from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair, and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Act or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants contend that the rationale behind the proposed order is based upon the reduction in the number of participants in the money market, the growing and significant role played in the money market by DBSI and the growing investment requirements of the Money Market Portfolios. In particular, applicants note the following:

(a) With over $59.15 billion invested in Money Market Instruments as of June 30, 2012, the Money Market Portfolios are major buyers and sellers in the money market with a strong need for access to large quantities of high quality Money Market Instruments. Applicants believe that access to a major dealer, such as DBSI, would increase the Money Market Portfolios' ability to obtain suitable portfolio securities.

(b) The policy of the Money Market Portfolios of investing in securities with short maturities and repurchase agreements, combined with the active portfolio management techniques employed by the Adviser, results in high portfolio activity and the need to make numerous purchases and sales of Money Market Instruments. This high portfolio activity likewise emphasizes the importance of increasing opportunities to obtain suitable portfolio securities and best price and execution.

(c) The money market, including the market for repurchase agreements, is highly competitive and maintaining a dealer as prominent as DBSI in the pool of dealers with which the Money Market Portfolios could conduct principal transactions may provide the Money Market Portfolios with improved opportunities to purchase and sell Money Market Instruments, including Money Market Instruments not available from any other source.

(d) DBSI is such a major factor in the money market that removing DBSI from the dealers with which the Money Market Portfolios may conduct principal transactions may indirectly deprive the Money Market Portfolios of obtaining best price and execution even when the Money Market Portfolios trade with unaffiliated dealers.

5. Applicants believe that the requested order will provide the Money Market Portfolios with broader and more complete access to the money market, which is necessary to carry out the policies and objectives of each of the Money Market Portfolios in seeking the best price, execution and quality in all portfolio transactions. In addition, applicants respectfully submit that the requested relief will provide the Money Market Portfolios with important information sources in the money market, to the direct benefit of the investors in the Money Market Portfolios. Applicants believe that the transactions contemplated by the application are identical to those in which they are currently engaged except for the proposed participation of DBSI, and that such transactions are consistent with the policies of the Money Market Portfolios as recited in their registration statements and reports filed under the Act. Applicants also submit that the procedures to be followed with respect to transactions with DBSI are structured in such a way as to ensure that the transactions will be, in all instances, reasonable and fair, will not involve overreaching on the part of any person concerned, and that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. *Transactions Subject to the Exemption*—The exemption shall be applicable to principal transactions in the secondary market and primary or secondary fixed-price dealer offerings not made pursuant to underwriting syndicates. The principal transactions that may be conducted pursuant to the exemption will be limited to transactions in *Eligible Securities.*[5] As the Money Market Portfolios are subject to Rule 2a–7, such *Eligible Securities* must meet the portfolio maturity and credit quality requirements of paragraphs (c)(2) and (c)(3) of Rule 2a–7. Additionally:

(a) No Money Market Portfolio shall make portfolio purchases pursuant to the exemption that would result directly or indirectly in the Money Market Portfolio investing pursuant to the exemption more than 2% of its *Total Assets* in securities which, when acquired by the Money Market Portfolio (either initially or upon any subsequent rollover) are *Second Tier Securities;* provided that any Money Market Portfolio may make portfolio sales of *Second Tier Securities* pursuant to the exemption without regard to this limitation.

(b) The exemption shall not apply to an *Unrated Security* other than a *Government Security.*

(c) The exemption shall not apply to any instrument, other than a repurchase agreement, issued by DB or any affiliated person thereof or to any instrument subject to a *Demand Feature* or *Guarantee* issued by DB or any affiliated person thereof.

2. *Repurchase Agreement Requirements*—The Money Market Portfolios may engage in repurchase agreements with DBSI only if DBSI has: (a) net capital, as defined in rule 15c3–1 under the 1934 Act, of at least $100 million and (b) a record (including the record of predecessors) of at least five years continuous operations as a dealer during which time it engaged in repurchase agreements relating to the kind of instrument subject to the repurchase agreement. DBSI shall furnish the Adviser with financial statements for its most recent fiscal year and the most recent semi-annual financial statements made available to its customers. The Adviser shall determine that DBSI complies with the above requirements and with other repurchase agreement guidelines adopted by the Board. Each repurchase agreement will be *Collateralized Fully.*

3. *Price Test*—In the case of purchase and sale transactions, a determination will be required in each instance, based upon the information available to the Money Market Portfolios and the Adviser, that the price available from DBSI is at least as favorable as that available from other sources. In the case of ''swaps'' involving trades of one instrument for another, the price test shall be based upon the transaction viewed as a whole, and not upon the two components thereof individually. With respect to transactions involving repurchase agreements, a determination will be required in each instance, based on the information available to the Money Market Portfolios and the Adviser, that the income to be earned from the repurchase agreement is at least equal to that available from other sources in connection with comparable repurchase agreements.

4. *Information Required to Document Compliance with Price Test*—Before any transaction may be conducted pursuant to the exemption, the relevant Money Market Portfolio or Adviser must obtain such information as it deems reasonably necessary to determine that the price test (as defined in condition 3 above) applicable to such transaction has been satisfied. In the case of each purchase or sale transaction, the relevant Money Market Portfolio or Adviser must make and document a good faith determination with respect to compliance with the price test based on current price information obtained through the contemporaneous solicitation of bona fide offers in connection with the type of instrument involved (comparable security falling within the same category of instrument, credit rating, maturity and segment, if any, but not necessarily the identical instrument or issuer). With respect to prospective purchases of securities by a Money Market Portfolio, these dealers must be those who have, in their inventories, or who otherwise have access to taxable money market instruments of the categories and the types desired and who are in a position to quote favorable prices with respect thereto. With respect to the prospective sale of securities by a Money Market Portfolio, these dealer firms must be those who, in the experience of the Money Market Portfolios and the Adviser, are in a position to quote favorable prices. Before any repurchase agreements are entered into pursuant to the exemption, the Money Market Portfolios or the Adviser must obtain and document competitive quotations from at least two other dealers with respect to repurchase agreements comparable to the type of repurchase agreement involved, except that if quotations are unavailable from two such dealers, only one other competitive quotation is required.

5. *Volume Limitations on Transactions*—Transactions other than repurchase agreements conducted

[5] Underlined terms are defined as set forth in paragraph (a) of Rule 2a–7 under the Act, unless otherwise indicated.

pursuant to the exemption shall be limited to no more than 25% of (a) the direct or indirect purchases or sales, as the case may be, by each Money Market Portfolio of *Eligible Securities* other than repurchase agreements; and (b) the purchases or sales, as the case may be, by DBSI of *Eligible Securities* other than repurchase agreements. Transactions comprising repurchase agreements conducted pursuant to the exemption shall be limited to no more than 10% of (a) the repurchase agreements directly or indirectly entered into by the relevant Money Market Portfolio and (b) the repurchase agreements transacted by DBSI. These calculations shall be measured on an annual basis (the fiscal year of each Money Market Portfolio and of DBSI) and shall be computed with respect to the dollar volume thereof.

6. *Permissible Dealer Spread*—DBSI's spreads in regard to any transaction with the Money Market Portfolios will be no greater than its customary dealer spreads, which will in turn be consistent with the average or standard spread charged by dealers in taxable money market instruments for the type of instrument and the size of transaction involved.

7. *The Parties Must Be Factually Independent*—The Adviser, on the one hand, and DBSI, on the other, will operate on different sides of appropriate walls of separation with respect to the Money Market Portfolios and *Eligible Securities.* The walls of separation will include all of the following characteristics, and such others that DBSI and the Adviser consider reasonable to facilitate the factual independence of the Adviser from DBSI:

(a) The Adviser will maintain offices physically separate from those of DBSI.

(b) The compensation of persons assigned to the Adviser (*i.e.,* executive, administrative or investment personnel) will not depend on the volume or nature of trades effected by the Adviser for the Money Market Portfolios with DBSI under the exemption, except to the extent that such trades may affect the profits and losses of DB and its subsidiaries as a whole.

(c) DBSI will not share any of its respective profits or losses on such transactions with the Adviser, except to the extent that such profits and losses affect the general firm-wide compensation of DB and its subsidiaries as a whole.

(d) Personnel assigned to the Adviser's investment advisory operations on behalf of the Money Market Portfolios will be exclusively devoted to the business and affairs of the Adviser. Personnel assigned to DBSI will not participate in the decision-making process for the Adviser or otherwise seek to influence the Adviser other than in the normal course of sales and dealer activities of the same nature as are simultaneously being carried out with respect to nonaffiliated institutional clients. The Adviser, on the one hand, and DBSI, on the other, may nonetheless maintain affiliations other than with respect to the Money Market Portfolios, and in addition with respect to the Money Market Portfolios as follows:

(i) Adviser personnel may rely on research, including credit analysis and reports prepared internally by various subsidiaries and divisions of DBSI.

(ii) Certain senior executives of DB that have responsibility for overseeing operations of various divisions, subsidiaries and affiliates of DB are not precluded from exercising those functions over the Adviser because they oversee DBSI as well, provided that such persons shall not have any involvement with respect to proposed transactions pursuant to the exemption and will not in any way attempt to influence or control the placing by the Money Market Portfolios or the Adviser of orders in respect of *Eligible Securities* with DBSI.

8. *Record-Keeping Requirements*—The Money Market Portfolios and the Adviser will maintain such records with respect to those transactions conducted pursuant to the exemption as may be necessary to confirm compliance with the conditions to the requested relief. In this regard:

(a) Each Money Market Portfolio shall maintain an itemized daily record of all purchases and sales of securities pursuant to the exemption, showing for each transaction: (i) The name and quantity of securities; (ii) the unit purchase or sale price; (iii) the time and date of the transaction; and (iv) whether the security was a *First Tier Security* or a *Second Tier Security.* For each transaction, these records shall document two quotations received from other dealers for comparable securities (except that, in the case of repurchase agreements and consistent with condition 4, if quotations are unavailable from two such dealers only one other competitive quotation is required), including the following: (i) The name of the dealers; (ii) the name of the securities; (iii) the prices quoted; (iv) the times and dates the quotations were received; and (v) whether such securities were *First Tier Securities* or *Second Tier Securities.*

(b) Each Money Market Portfolio shall maintain records sufficient to verify compliance with the volume limitations contained in condition 5 above. DBSI will provide the Money Market Portfolios with all records and information necessary to implement this requirement.

(c) Each Money Market Portfolio shall maintain a ledger or other record showing, on a daily basis, the percentage of the Money Market Portfolio's *Total Assets* represented by *Second Tier Securities* acquired from DBSI.

(d) Each Money Market Portfolio shall maintain records sufficient to verify compliance with the repurchase agreement requirements contained in condition 4 above.

The records required by this condition 8 will be maintained and preserved in the same manner as records required under rule 31a–1(b)(1) under the Act.

9. *Guidelines*—The Adviser and DBSI, with the assistance of their compliance departments, will prepare and administer guidelines for personnel of DBSI and the Adviser to make certain that transactions conducted pursuant to the exemption comply with the conditions set forth in the exemption and that the parties generally maintain arm's length relationships. In the training of DBSI's personnel, particular emphasis will be given to the fact that the Money Market Portfolios are to receive rates as favorable as other institutional purchasers buying the same quantities. The compliance departments will periodically monitor the activities of DBSI and the Adviser to make certain that the conditions set forth in the exemption are adhered to.

10. *Audit Committee Review*—The audit committee or another committee which, in each case, consists of members of the Board who are not interested persons as defined in section 2(a)(19) of the Act (''Independent Trustees''), will approve, periodically review and update as necessary, guidelines for the Adviser and DBSI reasonably designed to ensure that transactions conducted pursuant to the exemption comply with the conditions set forth herein and that the procedures described herein are followed in all respects. The respective audit committees will periodically monitor the activities of the Money Market Portfolios, the Adviser and DBSI in this regard to ensure that these matters are being accomplished.

11. *Board Review*—The Board, including a majority of the Independent Trustees, will have approved each Money Market Portfolio's participation in transactions conducted pursuant to the exemption and determined that such participation by the Money Market

Portfolio is in the best interests of the Money Market Portfolio and its shareholders. The minutes of the meeting of the Board at which this approval was given must reflect in detail the reasons for the Board's determination. The Board will review no less frequently than annually each Money Market Portfolio's participation in transactions conducted pursuant to the exemption during the prior year and determine whether the Money Market Portfolio's participation in such transactions continues to be in the best interests of the Money Market Portfolio and its shareholders. Such review will include (but not be limited to): (a) A comparison of the volume of transactions in each type of security conducted pursuant to the exemption to the market presence of DBSI in the market for that type of instrument, which market data may be based on good faith estimates to the extent that current formal data is not reasonably available, and (b) a determination that the Money Market Portfolios are maintaining appropriate trading relationships with other sources for each type of security to ensure that there are appropriate sources for the quotations required by condition 4. The minutes of the meeting of the Board at which such determinations are made will reflect in detail the reasons for the Board's determinations.

12. *Scope of Exemption*—Applicants expressly acknowledge that any order issued on the application would grant relief from section 17(a) of the Act only, and would not grant relief from any other section of, or rule under, the Act including, without limitation, Rule 2a–7.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–9357; 34–67771/August 31, 2012]

Order Making Fiscal Year 2013 Annual Adjustments to Registration Fee Rates

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 (''Securities Act'') requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 (''Exchange Act'') requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3]

The Investor and Capital Markets Fee Relief Act of 2002 (''Fee Relief Act'')[4] required the Commission to make annual adjustments to the fee rates applicable under these sections for each of the fiscal years 2003 through 2011 in an attempt to generate collections equal to yearly targets specified in the statute.[5] Under the Fee Relief Act, each year's fee rate was announced on the preceding April 30, and took effect five days after the date of enactment of the Commission's regular appropriation.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'')[6] changed many of the provisions related to these fees. The Dodd-Frank Act created new annual collection targets for FY 2012 and thereafter. It also changed the date by which the Commission must announce a new fiscal year's fee rate (August 31) and the date on which the new rate takes effect (October 1).

II. Fiscal Year 2013 Annual Adjustment to the Fee Rate

Section 6(b)(2) of the Securities Act, as amended by the Dodd-Frank Act, requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b).[7] The annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.[8]

Section 6(b)(2) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2013. Specifically, the Commission must adjust the fee rate under Section 6(b) to a ''rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2013], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target fee collection amount for [fiscal year 2013].'' That is, the adjusted rate is determined by dividing the ''target fee collection amount'' for fiscal year 2013 by the ''baseline estimate of the aggregate maximum offering prices'' for fiscal year 2013.

Section 6(b)(6)(A) specifies that the ''target fee collection amount'' for fiscal year 2013 is $455,000,000. Section 6(b)(6)(B) defines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2013 as ''the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2013] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget * * *.''

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2013, the Commission used a methodology similar to that developed in consultation with the Congressional Budget Office (''CBO'') and Office of Management and Budget (''OMB'') to project the aggregate offering price for purposes of the fiscal year 2012 annual adjustment.[9] Using this methodology, the Commission determines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2013 to be $3,336,846,226,098.[10] Based on this estimate, the Commission calculates the fee rate for fiscal 2013 to be $136.40 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

III. Effective Dates of the Annual Adjustments

The fiscal year 2013 annual adjustments to the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the

[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] Public Law 107–123, 115 Stat. 2390 (2002).

[5] *See* 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5) and 78n(g)(6).

[6] Public Law 111–203, 124 Stat.1376 (2010).

[7] 15 U.S.C. 77f(b)(2). The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the ''target fee collection amount'' specified in Section 6(b)(6)(A) for that fiscal year.

[8] 15 U.S.C. 78m(e)(4) and 15 U.S.C. 78n(g)(4).

[9] For the fiscal year 2011 estimate, the Commission used a ten-year series of monthly observations ending in March 2011. For fiscal year 2012, the Commission used a ten-year series ending in July 2011. For fiscal year 2013, the Commission used a ten-year series ending in July 2012.

[10] Appendix A explains how we determined the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2013 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2013 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2013.

Exchange Act will be effective on October 1, 2012.[11]

IV. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act,[12]

It is hereby ordered that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $136.40 per million effective on October 1, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

Appendix A

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the ''aggregate maximum offering prices,'' which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2013, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to July 2012, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2013

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (July 2002–July 2012). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more ''typical'' value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from July 2002 to July 2012.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(\text{AAMOP}_t) - \log(\text{AAMOP}_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software. Using least squares, the estimated parameter values are α=0.0016886 and β=−0.85600.

6. For the month of August 2012 forecast $\Delta_{t=8/12} = \alpha + \beta e_{t=7/12}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for October 2012 is given by $\text{FLAAMOP}_{t=10/12} = \log(\text{AAMOP}_{t=7/12}) + \Delta_{t=8/12} + \Delta_{t=9/12} + \Delta_{t=10/12}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(\text{FLAAMOP}_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For October 2012, this gives a forecast AAMOP of $13.0 billion (Column I), and a forecast AMOP of $299.4 billion (Column J).

10. Iterate this process through September 2013 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2013 of $3,336,846,226,098.

B. Using the Forecasts From A to Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/12 and 9/30/13 to be $3,336,846,226,098.

2. The rate necessary to collect the target $455,000,000 in fee revenues set by Congress is then calculated as: $455,000,000 ÷ $3,336,846,226,098= 0.000136356.

3. Round the result to the seventh decimal point, yielding a rate of 0.0001364 (or $136.40 per million).

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[11] 15 U.S.C. 77f(b)(4), 15 U.S.C. 78m(e)(6) and 15 U.S.C. 78n(g)(6).

[12] 15 U.S.C. 77f(b), 78m(e) and 78n(g).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/12 to 9/30/13 ($Millions)	3,336,846
b. Implied fee rate ($455 Million / a)	$136.40

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Jul-02	22	208,638	9,484	22.973					
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				
Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				
Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				
Apr-04	21	260,029	12,382	23.240	-0.454				
May-04	20	227,239	11,362	23.154	-0.086				
Jun-04	21	370,668	17,651	23.594	0.441				
Jul-04	21	305,519	14,549	23.401	-0.193				
Aug-04	22	179,688	8,168	22.823	-0.577				
Sep-04	21	357,007	17,000	23.556	0.733				

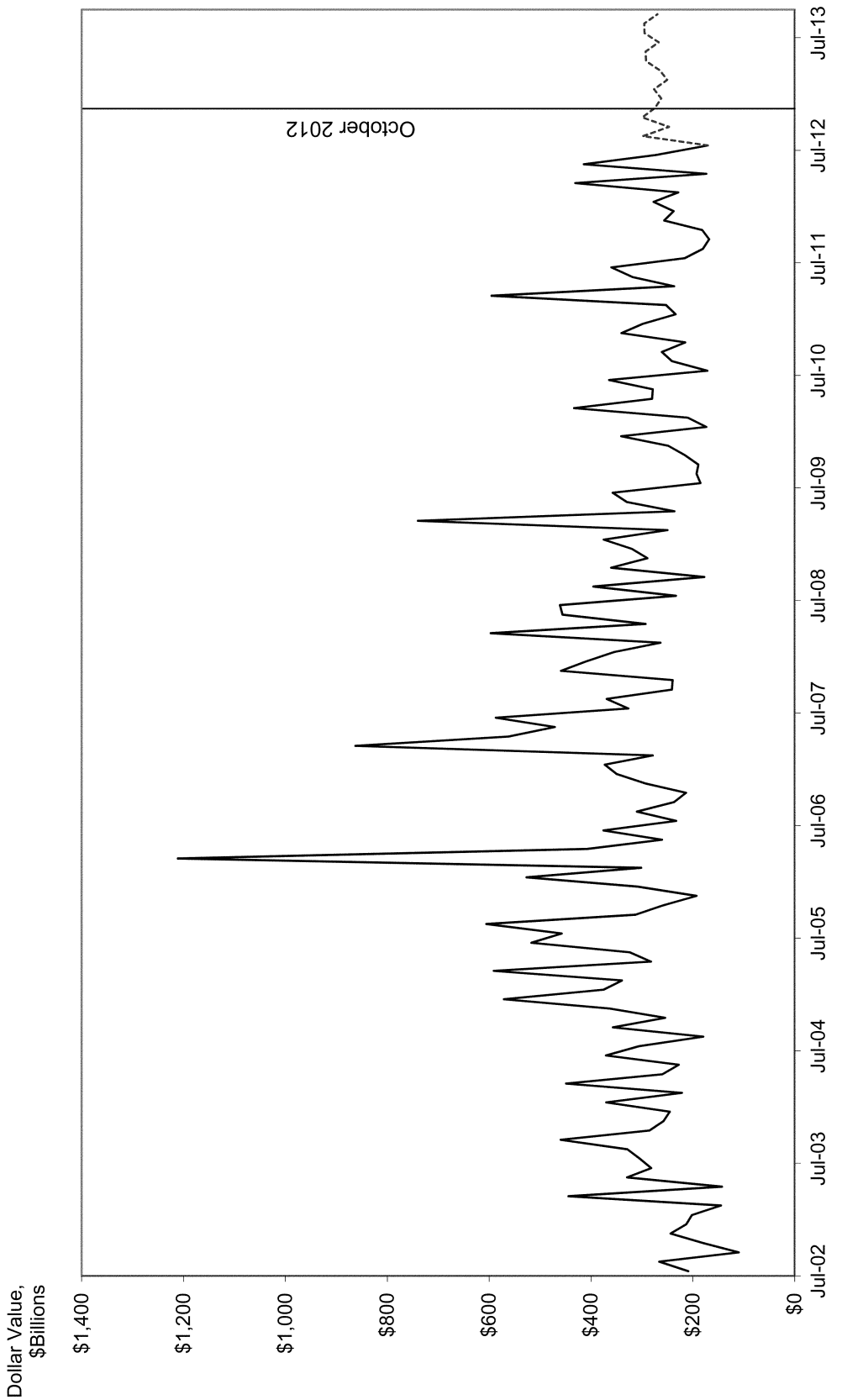
Oct-04	21	254,489	12,119	23.218	-0.338							
Nov-04	21	363,406	17,305	23.574	0.356							
Dec-04	22	570,918	25,951	23.979	0.405							
Jan-05	20	375,484	18,774	23.656	-0.324							
Feb-05	19	338,922	17,838	23.605	-0.051							
Mar-05	22	590,862	26,857	24.014	0.409							
Apr-05	21	282,018	13,429	23.321	-0.693							
May-05	21	323,652	15,412	23.458	0.138							
Jun-05	22	517,022	23,501	23.880	0.422							
Jul-05	20	457,487	22,874	23.853	-0.027							
Aug-05	23	605,534	26,328	23.994	0.141							
Sep-05	21	312,281	14,871	23.423	-0.571							
Oct-05	21	258,956	12,331	23.235	-0.187							
Nov-05	21	192,736	9,178	22.940	-0.295							
Dec-05	21	308,134	14,673	23.409	0.469							
Jan-06	20	526,550	26,328	23.994	0.585							
Feb-06	19	301,446	15,866	23.487	-0.506							
Mar-06	23	1,211,344	52,667	24.687	1.200							
Apr-06	19	407,345	21,439	23.788	-0.899							
May-06	22	260,121	11,824	23.193	-0.595							
Jun-06	22	375,296	17,059	23.560	0.367							
Jul-06	20	232,654	11,633	23.177	-0.383							
Aug-06	23	310,050	13,480	23.325	0.147							
Sep-06	20	236,782	11,839	23.195	-0.130							
Oct-06	22	213,342	9,697	22.995	-0.200							
Nov-06	21	292,456	13,926	23.357	0.362							
Dec-06	20	349,512	17,476	23.584	0.227							
Jan-07	20	372,740	18,637	23.648	0.064							
Feb-07	19	278,753	14,671	23.409	-0.239							
Mar-07	22	862,786	39,218	24.392	0.983							
Apr-07	20	562,103	28,105	24.059	-0.333							
May-07	22	470,843	21,402	23.787	-0.272							
Jun-07	21	586,822	27,944	24.053	0.267							
Jul-07	21	326,612	15,553	23.468	-0.586							

Aug-07	23	369,172	16,051	23.499	0.032							
Sep-07	19	241,059	12,687	23.264	-0.235							
Oct-07	23	239,652	10,420	23.067	-0.197							
Nov-07	21	458,654	21,841	23.807	0.740							
Dec-07	20	410,200	20,510	23.744	-0.063							
Jan-08	21	354,433	16,878	23.549	-0.195							
Feb-08	20	263,410	13,171	23.301	-0.248							
Mar-08	20	596,923	29,846	24.119	0.818							
Apr-08	22	292,534	13,297	23.311	-0.809							
May-08	21	456,077	21,718	23.801	0.491							
Jun-08	21	461,087	21,957	23.812	0.011							
Jul-08	22	232,896	10,586	23.083	-0.730							
Aug-08	21	395,440	18,830	23.659	0.576							
Sep-08	21	177,636	8,459	22.858	-0.800							
Oct-08	23	360,494	15,674	23.475	0.617							
Nov-08	19	288,911	15,206	23.445	-0.030							
Dec-08	22	319,584	14,527	23.399	-0.046							
Jan-09	20	375,065	18,753	23.655	0.255							
Feb-09	19	249,666	13,140	23.299	-0.356							
Mar-09	22	739,931	33,633	24.239	0.940							
Apr-09	21	235,914	11,234	23.142	-1.097							
May-09	20	329,522	16,476	23.525	0.383							
Jun-09	22	357,524	16,251	23.511	-0.014							
Jul-09	22	185,187	8,418	22.854	-0.658							
Aug-09	21	192,726	9,177	22.940	0.086							
Sep-09	21	189,224	9,011	22.922	-0.018							
Oct-09	22	215,720	9,805	23.006	0.085							
Nov-09	20	248,353	12,418	23.242	0.236							
Dec-09	22	340,464	15,476	23.463	0.220							
Jan-10	19	173,235	9,118	22.933	-0.529							
Feb-10	19	209,963	11,051	23.126	0.192							
Mar-10	23	432,934	18,823	23.658	0.533							
Apr-10	21	280,188	13,342	23.314	-0.344							
May-10	20	278,611	13,931	23.357	0.043							

Jun-10	22	364,251	16,557	23.530	0.173				
Jul-10	21	171,191	8,152	22.822	-0.709				
Aug-10	22	240,793	10,945	23.116	0.295				
Sep-10	21	260,783	12,418	23.242	0.126				
Oct-10	21	214,988	10,238	23.049	-0.193				
Nov-10	21	340,112	16,196	23.508	0.459				
Dec-10	22	297,992	13,545	23.329	-0.179				
Jan-11	20	233,668	11,683	23.181	-0.148				
Feb-11	19	252,785	13,304	23.311	0.130				
Mar-11	23	595,198	25,878	23.977	0.665				
Apr-11	20	236,355	11,818	23.193	-0.784				
May-11	21	319,053	15,193	23.444	0.251				
Jun-11	22	359,727	16,351	23.518	0.073				
Jul-11	20	215,391	10,770	23.100	-0.418				
Aug-11	23	179,870	7,820	22.780	-0.320				
Sep-11	21	168,005	8,000	22.803	0.023				
Oct-11	21	181,452	8,641	22.880	0.077				
Nov-11	21	256,418	12,210	23.226	0.346				
Dec-11	21	237,652	11,317	23.150	-0.076				
Jan-12	20	276,965	13,848	23.351	0.202				
Feb-12	20	228,419	11,421	23.159	-0.193				
Mar-12	22	430,806	19,582	23.698	0.539				
Apr-12	20	173,626	8,681	22.884	-0.813				
May-12	22	414,122	18,824	23.658	0.774				
Jun-12	21	272,218	12,963	23.285	-0.373				
Jul-12	21	170,462	8,117	22.817	-0.468				
Aug-12	23					23.217	0.365	12,939	297,607
Sep-12	19					23.219	0.369	12,979	246,606
Oct-12	23					23.220	0.373	13,019	299,441
Nov-12	21					23.222	0.376	13,059	274,244
Dec-12	20					23.224	0.380	13,099	261,988
Jan-13	21					23.225	0.384	13,140	275,934
Feb-13	19					23.227	0.387	13,180	250,423
Mar-13	20					23.229	0.391	13,221	264,414

Apr-13	22						23.230	0.394	13,261	291,750
May-13	22						23.232	0.398	13,302	292,648
Jun-13	20						23.234	0.401	13,343	266,862
Jul-13	22						23.235	0.405	13,384	294,451
Aug-13	22						23.237	0.408	13,425	295,357
Sep-13	20						23.239	0.412	13,467	269,333

Figure A
Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)
(Dashed Line Indicates Forecast Values)



[FR Doc. 2012–22022 Filed 9–6–12; 8:45 am]
BILLING CODE 8011–01–C

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

eHydrogen Solutions, Inc., and ChromoCure, Inc.; Order of Suspension of Trading

September 5, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of eHydrogen Solutions, Inc. (EHYD) because of questions concerning the adequacy of publicly available information about the company.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of ChromoCure, Inc. (KKUR) because of questions concerning the adequacy of publicly available information about the company.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. e.d.t., on September 5, 2012 through 11:59 p.m. e.d.t., on September 18, 2012.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2012–22168 Filed 9–5–12; 4:15 pm]
BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67765; File No. SR–EDGA–2012–38]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Edge Routed Liquidity Report

August 31, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 21, 2012, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to offer a new Exchange market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members [3] and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Exchange proposes to add a description of the Edge Routed Liquidity Report to new Rule 13.9. The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to begin offering Edge Routed Liquidity Report, a data feed that contains historical order information for orders routed to away destinations by the Exchange. Edge Routed Liquidity Report will be a data feed product that provides routed order information to Subscribers on the morning of the following trading day (T + 1), including: Limit price, routed quantity, symbol, side (bid/offer), time of routing, and the National Best Bid and Offer (NBBO) at the time of routing.

The Exchange will make Edge Routed Liquidity Report available to all Subscribers via subscription through secure Internet connections. Edge Routed Liquidity Report will be offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report''). Both the Standard Report and the Premium Report will provide Subscribers with a view of all marketable orders that are routed to away destinations by the Exchange. However, the Premium Report will also identify the routing destination as either directed to a destination that is not an exchange (''Non-Exchange Destination'') or directed to another exchange. For orders that are routed to a Non-Exchange Destination, the Premium Report will indicate the nature of any liquidity the originating routing strategy seeks.

Purchasers of Edge Routed Liquidity Report will be able to elect to obtain data on a rolling thirty (30) day subscription or a calendar month request for as many months as desired.

The Exchange is proposing to charge Subscribers a fee in the amount of $500.00/month for a rolling thirty (30) day Standard Report and $500.00/month for a calendar month request. With respect to the Premium Report, the Exchange is proposing to charge Subscribers a fee in the amount of $1,500.00/month for a rolling thirty (30) day Premium Report and $1,500.00/month for a calendar month request. Edge Routed Liquidity Report will be provided to Subscribers for internal use only, and thus, no redistribution will be permitted. Edge Routed Liquidity Report can be used by market participants to improve their trading and order routing strategies by being able to discern missed trading opportunities if a Member had been present on the EDGA book.

Edge Routed Liquidity Report will provide an indication of the quantity/quality of the order flow that Members of the Exchange could have interacted with if they had additional posted liquidity on the Exchange's book. The purpose of Edge Routed Liquidity Report is to allow Subscribers to identify missed opportunities so that they can make the necessary trading system changes to better interact with missed liquidity. By making the Edge Routed Liquidity Report data available, the Exchange enhances market transparency and fosters competition among orders and markets.

Historical data can be used for a variety of purposes, such as to support financial market research and analysis as well as back-testing of new trading strategies to gauge effectiveness. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

Exchange notes that various historical data products are offered by the Exchange and other market centers as discussed below.[4]

The Exchange intends to implement the proposed rule change on or about September 4, 2012 and will announce its availability via an information circular to be posted on the Exchange's Web site.

2. Statutory Basis

The proposed rule change is consistent with the requirements of the Act[5] and the rules and regulations thereunder that are applicable to a national securities exchange. The bases under the Act for the proposed rule change are: (1) The requirement under Section 6(b)(4)[6] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities; and (2) the requirement under Section 6(b)(5)[7] that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

Indeed, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act[8] because it provides an equitable allocation of reasonable dues, fees and other charges among the Subscribers of the Exchange data. Edge Routed Liquidity Report is optional and fees charged for the Service will be the same for both Member and non-Member Subscribers.

Furthermore, as the Service will be provided in multiple packages, the Exchange intends to allow the purchase of such access in the manner that best meets the needs of, and is most cost efficient for, each respective Subscriber. The fees for Edge Routed Liquidity Report are uniform except with respect to reasonable distinctions with respect to Standard Report and the Premium Report. The Exchange proposes charging more for the Premium Report than for the Standard Report because of the additional features provided on the Premium Report, as described above. The fees reflect the differing offerings that a Subscriber may choose and are reasonable in light of the benefits of market transparency and additional information to aid Subscribers in developing or modifying their trading strategies.

The revenue generated by Edge Routed Liquidity Report will pay for the development, marketing, technical infrastructure and operating costs of the Service, an important tool for market participants to use for purposes of analysis, research and testing. Profits generated above these costs will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. This increased revenue stream will allow the Exchange to offer an innovative Service at a reasonable rate, consistent with other self-regulatory organizations (''SROs'') who provide similar types of historical market data products.[9] Furthermore, the fees are fair and reasonable because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge for its market data products.[10]

The Exchange believes that the proposed rule change is also consistent with the objectives of Section 6(b)(5) of the Act,[11] which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of an additional market data product and by announcing its availability via information circular. In addition, the Exchange is making a voluntary decision to make this Service available and through the dissemination of such market data, the Exchange will provide market participants with the opportunity to obtain additional data in furtherance of their investment decisions. Purchase of the Service is not a prerequisite for participation on the Exchange, nor is membership to the Exchange a prerequisite to purchase of the Service. Only those Subscribers that deem this market data product to be of sufficient overall value and usefulness will purchase it. Moreover, the fees will apply uniformly to all Subscribers of the Standard Report and Premium Report, respectively, irrespective of whether the Subscriber is a Member of the Exchange.

The Exchange is not required by the Act in the first instance to make the Service available. The Exchange chooses to make the Service available as proposed in order to improve market quality, to attract order flow, and to increase market transparency. Once this filing becomes effective, the Exchange will be required to continue making the Service available until such time as the Exchange changes its rule.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data services to the public. The Commission believed this authority would expand the amount of data available to market participants, and also spur innovation and competition for the provision of market data. Edge Routed Liquidity Report appears to be precisely the sort of market data service that the Commission envisioned when it adopted Regulation NMS.[12] The Service

[4] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the New York Stock Exchange (''NYSE''); *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(4).

[9] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[10] *Id.*

[11] 15 U.S.C. 78f(b)(5).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and

Continued

will offer routed order-specific data in a form not previously available to market data consumers, yet the Service will act in a manner functionally similar to market data products offered by the Exchange and other market centers.[13] The Service offers a new, alternative, innovative, useful and cost-effective market data product that is consistent with existing historical type market data products. It will allow market participants to purchase useful historical data from the Exchange while at the same time enabling the Exchange to better cover its infrastructure costs and to improve its market technology and services. Finally, Edge Routed Liquidity Report will better enable market participants to conduct trading/investment analyses and discern useful market data concerning routed order flow to better meet their needs.

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (DC Cir. 2010), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' [14] The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' '' [15]

The Court in NetCoalition, while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record in that case did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSEArca's data product at issue in that case. The Exchange believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the NetCoalition case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[16] Moreover, the Exchange further notes that the product at issue in this filing, a historical data product that is functionally similar to other historical data products whose fees have been reviewed and filed with the Commission,[17] is quite different from the NYSEArca depth-of-book data product at issue in NetCoalition. Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

There is significant competition for the provision of market data to market participants, as well as competition for the orders that generate that data. In introducing the proposed Service, the Exchange would be providing an additional market data product to those already offered by other market centers.[18]

The Service is purely optional and can be used by Subscribers who see value in the format in which the Service presents historical data. Given this, the Exchange does not believe that the Service will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

At any time within 60 days of the filing of the proposed rule change, the

consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.'').

[13] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[14] NetCoalition, at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

[15] *Id.*

[16] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. Although this change in the law does not alter the Commission's authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

[17] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EDGA–2012–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–EDGA–2012–38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of EDGA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2012–38 and should be submitted on or before September 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22015 Filed 9–6–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67766; File No. SR–EDGX–2012–37]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Edge Routed Liquidity Report

August 31, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 21, 2012, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to offer a new Exchange market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members [3] and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Exchange proposes to add a description of the Edge Routed Liquidity Report to new Rule 13.9. The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to begin offering Edge Routed Liquidity Report, a data feed that contains historical order information for orders routed to away destinations by the Exchange. Edge Routed Liquidity Report will be a data feed product that provides routed order information to Subscribers on the morning of the following trading day (T + 1), including: Limit price, routed quantity, symbol, side (bid/offer), time of routing, and the National Best Bid and Offer (NBBO) at the time of routing.

The Exchange will make Edge Routed Liquidity Report available to all Subscribers via subscription through secure Internet connections. Edge Routed Liquidity Report will be offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report''). Both the Standard Report and the Premium Report will provide Subscribers with a view of all marketable orders that are routed to away destinations by the Exchange. However, the Premium Report will also identify the routing destination as either directed to a destination that is not an exchange (''Non-Exchange Destination'') or directed to another exchange. For orders that are routed to a Non-Exchange Destination, the Premium Report will indicate the nature of any liquidity the originating routing strategy seeks.

Purchasers of Edge Routed Liquidity Report will be able to elect to obtain data on a rolling thirty (30) day subscription or a calendar month request for as many months as desired.

The Exchange is proposing to charge Subscribers a fee in the amount of $500.00/month for a rolling thirty (30) day Standard Report and $500.00/month for a calendar month request. With respect to the Premium Report, the Exchange is proposing to charge Subscribers a fee in the amount of $1,500.00/month for a rolling thirty (30) day Premium Report and $1,500.00/month for a calendar month request.

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

Edge Routed Liquidity Report will be provided to Subscribers for internal use only, and thus, no redistribution will be permitted. Edge Routed Liquidity Report can be used by market participants to improve their trading and order routing strategies by being able to discern missed trading opportunities if a Member had been present on the EDGX book.

Edge Routed Liquidity Report will provide an indication of the quantity/quality of the order flow that Members of the Exchange could have interacted with if they had additional posted liquidity on the Exchange's book. The purpose of Edge Routed Liquidity Report is to allow Subscribers to identify missed opportunities so that they can make the necessary trading system changes to better interact with missed liquidity. By making the Edge Routed Liquidity Report data available, the Exchange enhances market transparency and fosters competition among orders and markets.

Historical data can be used for a variety of purposes, such as to support financial market research and analysis as well as back-testing of new trading strategies to gauge effectiveness. The Exchange notes that various historical data products are offered by the Exchange and other market centers as discussed below.[4]

The Exchange intends to implement the proposed rule change on or about September 4, 2012 and will announce its availability via an information circular to be posted on the Exchange's Web site.

2. Statutory Basis

The proposed rule change is consistent with the requirements of the Act[5] and the rules and regulations thereunder that are applicable to a national securities exchange. The bases under the Act for the proposed rule change are: (1) The requirement under Section 6(b)(4)[6] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities; and (2) the requirement under Section 6(b)(5)[7] that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

Indeed, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act[8] because it provides an equitable allocation of reasonable dues, fees and other charges among the Subscribers of the Exchange data. Edge Routed Liquidity Report is optional and fees charged for the Service will be the same for both Member and non-Member Subscribers.

Furthermore, as the Service will be provided in multiple packages, the Exchange intends to allow the purchase of such access in the manner that best meets the needs of, and is most cost efficient for, each respective Subscriber. The fees for Edge Routed Liquidity Report are uniform except with respect to reasonable distinctions with respect to Standard Report and the Premium Report. The Exchange proposes charging more for the Premium Report than for the Standard Report because of the additional features provided on the Premium Report, as described above. The fees reflect the differing offerings that a Subscriber may choose and are reasonable in light of the benefits of market transparency and additional information to aid Subscribers in developing or modifying their trading strategies.

The revenue generated by Edge Routed Liquidity Report will pay for the development, marketing, technical infrastructure and operating costs of the Service, an important tool for market participants to use for purposes of analysis, research and testing. Profits generated above these costs will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. This increased revenue stream will allow the Exchange to offer an innovative Service at a reasonable rate, consistent with other self-regulatory organizations (''SROs'') who provide similar types of historical market data products.[9] Furthermore, the fees are fair and reasonable because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge for its market data products.[10]

The Exchange believes that the proposed rule change is also consistent with the objectives of Section 6(b)(5) of the Act,[11] which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of an additional market data product and by announcing its availability via information circular. In addition, the Exchange is making a voluntary decision to make this Service available and through the dissemination of such market data, the Exchange will provide market participants with the opportunity to obtain additional data in furtherance of their investment decisions. Purchase of the Service is not a prerequisite for participation on the Exchange, nor is membership to the Exchange a prerequisite to purchase of the Service. Only those Subscribers that deem this market data product to be of sufficient overall value and usefulness will purchase it. Moreover, the fees will apply uniformly to all Subscribers of the Standard Report and Premium Report,

[4] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the New York Stock Exchange (''NYSE''); *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(4).

[9] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[10] *Id.*

[11] 15 U.S.C. 78f(b)(5).

respectively, irrespective of whether the Subscriber is a Member of the Exchange.

The Exchange is not required by the Act in the first instance to make the Service available. The Exchange chooses to make the Service available as proposed in order to improve market quality, to attract order flow, and to increase market transparency. Once this filing becomes effective, the Exchange will be required to continue making the Service available until such time as the Exchange changes its rule.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data services to the public. The Commission believed this authority would expand the amount of data available to market participants, and also spur innovation and competition for the provision of market data. Edge Routed Liquidity Report appears to be precisely the sort of market data service that the Commission envisioned when it adopted Regulation NMS.[12] The Service will offer routed order-specific data in a form not previously available to market data consumers, yet the Service will act in a manner functionally similar to market data products offered by the Exchange and other market centers.[13] The Service offers a new, alternative, innovative, useful and cost-effective market data product that is consistent with existing historical type market data products. It will allow market participants to purchase useful historical data from the Exchange while at the same time enabling the Exchange to better cover its infrastructure costs and to improve its market technology and services. Finally, Edge Routed Liquidity Report will better enable market participants to conduct trading/investment analyses and discern useful market data concerning routed order flow to better meet their needs.

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' [14] The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' '' [15]

The Court in NetCoalition, while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record in that case did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSEArca's data product at issue in that case. The Exchange believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the NetCoalition case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[16] Moreover, the Exchange further notes that the product at issue in this filing, a historical data product that is functionally similar to other historical data products whose fees have been reviewed and filed with the Commission,[17] is quite different from the NYSEArca depth-of-book data product at issue in NetCoalition. Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

There is significant competition for the provision of market data to market participants, as well as competition for the orders that generate that data. In introducing the proposed Service, the Exchange would be providing an additional market data product to those already offered by other market centers.[18]

The Service is purely optional and can be used by Subscribers who see value in the format in which the Service presents historical data. Given this, the Exchange does not believe that the Service will result in any burden on competition that is not necessary or

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.'').

[13] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[14] NetCoalition, at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

[15] *Id.*

[16] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. Although this change in the law does not alter the Commission's authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

[17] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; *see also,* NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[18] *Id.*

appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2012–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–EDGX–2012–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of EDGX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2012–37 and should be submitted on or before September 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22016 Filed 9–6–12; 8:45 am]

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[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67764; File No. SR–NYSEMKT–2012–44]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule To Change the Number of Amex Trading Permits Required by NYSE Amex Market Makers Based on the Number of Options in Their Appointment

August 31, 2012.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on August 24, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') to change the number of Amex Trading Permits (''ATP'') required by NYSE Amex Market Makers based on the number of options in their appointment. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE MKT proposes to amend the Fee Schedule to change the number of Amex Trading Permits (''ATP'') required by NYSE Amex Market Makers based on the number of options in their electronic appointment.

Currently, NYSE Amex Options Market Makers are free to apply to have any number of option classes in their trading appointment, subject to the following schedule:

(1) Market Makers with one ATP may have up to 100 option issues included in their electronic appointment;

(2) Market Makers with two ATPs may have up to 250 option issues included in their electronic appointment;

(3) Market Makers with three ATPs may have up to 750 option issues included in their electronic appointment; and

(4) Market Makers with four ATPs may have all option issues traded on the Exchange included in their electronic appointment.

Under the proposal, NYSE Amex Options Market Makers (which include Floor Market Makers) will be free to apply to have any number of option classes in their electronic trading appointment, subject to the following schedule:

One ATP = 60 issues, plus the bottom 45% of issues traded on the Exchange by volume;

Two ATPs = 150 issues, plus the bottom 45% of issues traded on the Exchange by volume;

Three ATPs = 500 issues, plus the bottom 45% of issues traded on the Exchange by volume;

Four ATPs = 1,100 issues, plus the bottom 45% of issues traded on the Exchange by volume; and

Five ATPs = All issues traded on the Exchange.

The ''bottom 45%'' of issues traded on the Exchange refers to the least actively traded issues on the Exchange, ranked by industry volume, as reported by the OCC for each issue during the calendar quarter. Each calendar quarter, with a one-month lag, the Exchange will publish on its Web site a list of the bottom 45% of issues traded by industry volume. For example, based on industry volume for April, May, and June 2012, the Exchange will rank all options traded on the Exchange as of the last day of that period, which will then become the bottom 45% of issues for the period beginning August 1, 2012. As of June 30, 2012, there were 2,196 options traded on the Exchange, so the bottom 45% would total 988 options for that period. The Exchange will recalculate this list using industry volumes for July, August, and September 2012 for the period beginning November 1, 2012, and so on. Any newly listed issues will automatically become part of the bottom 45% until the next evaluation period, at which time they may or may not remain part of the bottom 45% list depending upon their trading volumes and resultant rank among all issues traded on the Exchange.

The proposed rule change is effective upon filing and will not become operative until 30 days after the date of this filing, or such shorter time as the Commission may designate. The Exchange has requested that the Commission waive all or a portion of the 30-day operative delay period so that it may implement the proposed change on September 1, 2012. If the Commission does not waive all or a portion of the 30-day operative delay period, the proposed changes will be implemented on October 1, 2012.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)[4] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In making the proposed changes, the Exchange's objective is to better align the Fee Schedule with the level of activity on the Exchange while properly incenting Market Makers to quote in a broad range of options, including less liquid and active names, to promote transparency and price discovery in those names, which will benefit all Exchange participants and the public interest.[6]

The proposal to change the number of ATPs required for a certain number of appointments will promote just and equitable principles of trade and will remove impediments to and perfect the mechanisms of a free and open market for the following reasons. First, the proposed rule change allows Market Makers affordable access to all issues traded on the Exchange when viewed in light of the cost for a market maker on at least two other exchanges to obtain a sufficient number of trading permits or rights to quote a similar number of names. For example, on the International Securities Exchange (''ISE''), a Competitive Market Maker (''CMM'') is required to have nine CMM Trading Rights in order to quote all issues on the ISE.[7] CMM Trading Rights on the ISE are fixed in terms of the number that are available and must be bought or leased from someone who possesses them. The last sale for a CMM Trading Right on the ISE was for $1,550,000 on November 30, 2009.[8] As of July 17, 2012, there appeared to be a total of seven CMM Trading Rights available for sale or lease, which are two fewer than the number required to quote all issues on the ISE.[9] The Exchange estimates that the monthly lease cost is somewhere in the range of $7,000 to $11,000 per month.[10] Assuming the best-case scenario of being able to obtain a lease at the most favorable price for each of the nine CMM Trading Rights needed to quote every name on ISE, the Exchange estimates that it would cost a market maker approximately $63,000 per month in rights fees. By comparison, under the proposal, a NYSE Amex Options Market Maker will pay $26,000 per month in rights fees to quote the entire universe of names on the Exchange.

A further comparison may be made with the Chicago Board Options Exchange (''CBOE'') and the trading permit costs for a market maker to create an assignment there. CBOE has a sliding scale for Trading Permit Holders (''TPHs'') who are acting as market makers. The sliding scale is $5,500 per month for permits one to 10, $4,000 per month for permits 11 to 20, and $2,500 for permits 21 and higher. The discounted permit rates of $4,000 and $2,500 are only available to TPHs who commit to a full year of that number of permits. In configuring an appointment on CBOE, a market maker incurs an appointment cost for each option in its appointment based on various tiers.[11] The appointment cost can be calculated using an ''appointment calculator'' provided to TPHs.[12] The Exchange used the appointment calculator dated July 10, 2012 to calculate the cost to construct a market maker appointment consisting of all 2,196 options traded on the Exchange as of June 30, 2012. The result shows that a total of 28 trading permits would be required to create a market maker appointment on CBOE that consisted of all options traded on

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] The Exchange notes that it has adequate systems capacity to accommodate any increase in quoting.

[7] *See* ISE Rule 802(c) and *http://www.ise.com/WebForm/viewPage.aspx?categoryId=563.*

[8] *See* Secondary Market Sales after May 1, 2002, available at *http://www.ise.com/WebForm/viewPage.aspx?categoryId=222.*

[9] *See http://www.ise.com/WebForm/viewPage.aspx?categoryId=563.*

[10] Based on the last reported sale of $1,550,000, if one uses five-year straight-line depreciation, the monthly cost of a single CMM Trading Right is $25,833. In light of this, coupled with decreased volumes in the industry, the Exchange believes that a lease rate of between $7,000 and $11,000 per month per CMM Trading Right is a reasonable estimate and has confirmed that estimate informally with market participants.

[11] *See* CBOE Rule 8.3.

[12] The appointment calculator is available at *https://www.cboe.org/publish/SeatCalculator/SeatCalcUpdated071012.xlt.*

the Exchange.[13] Assuming the best-case scenario in which a market maker committed to a full year of utilizing 28 permits, a market maker on CBOE would pay $115,000 per month in permit costs or $89,000 more per month than an NYSE Amex Options Market Maker would pay under the proposal.

The Exchange further notes that by virtue of the limited number of CMM Trading Rights available for sale or lease on ISE and the Class Quoting Limit (''CQL'') [14] on CBOE, the barriers to entry on both exchanges for a market maker are quite high in that it may not be possible to create a market maker appointment of one's choosing due to either a lack of available CMM Trading Rights on ISE or a CQL on CBOE that has been reached. Under the Exchange's proposal, no such artificial barrier to entry will be created, and coupled with the relatively lower monthly cost to acquire ATPs, the proposal will remove certain impediments to trade on the options markets.

In designing the proposal, the Exchange wanted to encourage market making in less liquid and active option issues. This is beneficial to all Exchange participants and market participants generally. Under the proposal, the first ATP permits an NYSE Amex Options Market Maker to create an appointment for submitting quotes electronically that will consist of 60 options of its choosing, plus the bottom 45% of options traded on the Exchange. As of June 30, 2012, there were 2,196 options on the Exchange, which means that the bottom 45% consists of 988 options. Under the proposal, this means that a NYSE Amex Options Market Maker with one ATP will be able to create an assignment consisting of 1,048 options, far greater than the 100 options permitted under the current Fee Schedule. The proposal increases the total number of ATPs required to quote all options on the Exchange from four to five and increases the monthly cost for an NYSE Amex Options Market Maker from $23,000 to $26,000 per month. Again, viewed in light of the costs to establish a similar assignment on at least two other exchanges, the proposed rule change is just, equitable, and removes impediments to a free and open market, particularly since the proposal is designed to encourage greater quoting in less liquid names that will benefit the marketplace through increased price discovery. The proposal is consistent with just and equitable principles of trade since it will apply to all NYSE Amex Options Market Makers equally.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) [17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative on September 1, 2012. The Exchange has indicated that the proposal is designed to better align the Fee Schedule with the level of activity on the Exchange. The Exchange further stated that it believes the proposal will incent Market Makers to quote in a broad range of options, including less liquid and active names, and therefore will promote transparency and price discovery in those names. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest [19] and designates the proposed rule change to be operative on September 1, 2012.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEMKT–2012–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2012–44. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

[13] Of the 2,196 options traded on the Exchange as of June 30, 2012, 2,000 were trading on the CBOE, and it would require 28 TPHs to create an appointment in those names.

[14] *See* CBOE Rule 8.3A.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–44 and should be submitted on or before September 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22058 Filed 9–6–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67772; File No. SR–C2–2012–024]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change to Adopt a Designated Primary Market-Maker Program

August 31, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 21, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a Designated Primary Market-Maker (''DPM'') program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, at the Commission's Web site (*http://www.sec.gov*), and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change proposes to adopt a DPM program.[3] The Exchange believes the DPM program will encourage deeper liquidity in allocated classes by imposing obligations on DPMs to attract order flow to the Exchange in allocated securities and to quote competitively. These proposed Rules also impose special eligibility requirements and market performance standards on DPMs. As specialists, DPMs will receive a trade participation right in their allocated classes in exchange for their heightened responsibilities.

DPM Program

Rule 1.1—Definition of DPM[4]

The proposed rule change amends Rule 1.1 to adopt a definition of the term ''Designated Primary Market-Maker'', which is used throughout the proposed DPM Rules. A DPM is a Participant[5] organization that is approved by the Exchange to function in allocated securities as a Market-Maker and is subject to obligations under proposed Rule 8.17. The purpose of requiring that a DPM be an organization is to ensure that each DPM has a formal organizational structure in place to govern the manner in which it will operate as a DPM. The Exchange believes it is essential that it have the sole authority to approve a Participant organization to act as a DPM to ensure that the Participant organization satisfies the eligibility requirements set forth in proposed Rule 8.14 and the financial requirements set forth in proposed Rule 8.18, and can otherwise meet the obligations and responsibilities of a DPM set forth in proposed Rule 8.17.

Rule 8.14—Approval to Act as a DPM[6]

Proposed Rule 8.14 addresses the DPM approval process. To act as a DPM, a Participant must file an application with the Exchange on such forms as the Exchange may prescribe. The Exchange will determine the appropriate number of approved DPMs. The Exchange will make each DPM approval from among the DPM applications on file with the Exchange, based on the Exchange's judgment as to which applicant is best able to perform the functions of a DPM. The factors the Exchange may consider when making this selection include, but are not limited to, any one or more of the following:

(1) Adequacy of capital;

(2) operational capacity;

(3) trading experience of and observance of generally accepted standards of conduct by the applicant and its associated persons;

(4) regulatory history of and history of adherence to Exchange Rules by the applicant and its associated persons; and

(5) willingness and ability of the applicant and its associated persons to promote the Exchange as a marketplace.

The following are some examples of the many ways in which the Exchange may consider these factors:

• In considering adequacy of capital of an applicant, the Exchange may look at whether the applicant meets the financial requirements set forth in proposed Rule 8.18 and whether it otherwise has the resources to meet the heightened responsibilities.

• In considering operational capacity of an applicant, the Exchange may look to criteria such as the number of Market-Makers or personnel and the ability to process order flow in determining whether it would be able to satisfy the DPM obligations in an efficient manner.

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rules are based generally on the rules governing the DPM program on Chicago Board Options Exchange, Incorporated (''CBOE''), excluding among other things certain provisions that are inapplicable to C2 (such as provisions related to floor trading and CBOE-specific provisions) as well as other provisions that are outdated. *See* CBOE Rules 6.45A(a)(ii)(2) and (iii), 6.45B(a)(i)(2) and (iii), 8.80, 8.83–8.91, 8.95, and 17.50(g)(14). *See* Item 8 of the Form 19b–4 for a discussion of the differences between the proposed Rules and the corresponding CBOE rules.

[4] *See* CBOE Rule 8.80(a).

[5] A ''Participant'' is an Exchange-recognized holder of a Trading Permit, which is an Exchange-issued permit that confers the ability to transact on the Exchange. *See* Rule 1.1.

[6] *See* CBOE Rules 8.83, 8.88, and 8.89.

• In considering trading experience of and observance of generally accepted standards of conduct by the applicant and its associated persons, the Exchange may look at the applicant's and its associated persons' history at the Exchange or in the industry, the trading volume of the applicant and its associated persons, and market performance reviews in determining whether the applicant would be able to meet the DPM market performance standards.

• In considering the regulatory history of and history of adherence to Exchange Rules by the applicant and its associated persons, the Exchange may look to whether the applicant or its associated persons have been found to have violated Exchange rules or have been subject to any enforcement proceedings in determining whether the applicant and its associated persons would comply with obligations imposed by the DPM Rules and other Rules of the Exchange, as well as federal securities laws and regulations.

• In considering willingness and ability of the applicant and its associated persons to promote the Exchange as a marketplace, the Exchange may look at whether the applicant has engaged (or how it intends to engage) in activities such as assisting in meeting and educating market participants, maintaining communications with Participants in order to be responsive to suggestions and complaints, and responding to suggestions and complaints in determining whether the applicant could bring order flow to the Exchange.

These are the primary factors that the Exchange believes are necessary for it to consider when determining whether a DPM applicant is able to meet the DPM obligations, responsibilities, and market performance standards imposed by the proposed DPM Rules. Given that the Exchange may limit the number of approved DPMs, it is important that the Exchange can reasonably determine that the Participants it approves to act as DPMs will increase liquidity and quote competitively in order to attract order flow as intended by the proposed DPM program.

Each applicant for approval as a DPM will have an opportunity to present any matter that it wishes the Exchange to consider in conjunction with the approval decision. The Exchange may require that a presentation be solely or partially in writing, and may require the submission of additional information from the applicant or its associated persons. Formal rules of evidence will not apply to these proceedings. This opportunity will allow a DPM applicant to ensure that the Exchange considers all information that the DPM applicant deems relevant, in addition to the standard information described by the factors above that the Exchange reviews. The Exchange believes the presentation of this information, in addition to the information requested by the Exchange, will result in fair and fully informed decisions by the Exchange during the DPM approval process.

In selecting an applicant for approval as a DPM, the Exchange may place one or more conditions on the approval, including but not limited to conditions concerning the capital or operations of or persons associated with the DPM applicant, and the number or type of securities that may be allocated to the applicant. Depending on the circumstances surrounding a specific DPM applicant, the Exchange believes it is necessary to have the ability to impose conditions on the specific DPM approval in addition to the obligations otherwise imposed by the DPM Rules as an additional means to ensure that the DPM applicant is able to adequately perform the DPM functions.

Each DPM will retain its approval to act as a DPM for one year, unless the Exchange relieves the DPM of its approval and obligations to act as a DPM or earlier terminates the DPM's approval to act as a DPM pursuant to proposed Rule 8.20. After each one-year term, a DPM may file an application with the Exchange to renew its approval to act as a DPM on forms prescribed by the Exchange, which renewal application the Exchange may approve or disapprove in its sole discretion in the same manner and based on the same factors set forth in proposed Rule 8.14(b) through (d), and any other factors the Exchange deems relevant (including an evaluation of the extent to which the DPM has satisfied its obligations under proposed Rule 8.17). Because the proposed rule change provides that the Exchange will determine the appropriate number of approved DPMs in a class, the Exchange believes that having temporary DPM appointments will provide all Participants with regular opportunities to be selected as DPMs by the Exchange rather than allow certain Participants to have perpetual DPM appointments.

If the Exchange terminates or otherwise limits its approval for a Participant to act as a DPM, the Exchange may do one or both of the following: (1) Approve a DPM on an interim basis, pending the final approval of a new DPM; and (2) allocate on an interim basis to another DPM(s) the securities that were allocated to the affected DPM, pending a final allocation of the securities pursuant to proposed Rule 8.15 (as described below). Neither an interim approval nor allocation will be viewed as a prejudgment with respect to the final approval or allocation. Interim approvals and allocations will provide uninterrupted DPM quoting in appointed classes and prevent any reduced liquidity in those classes that could otherwise result from a termination, condition, or limit on a DPM's approval or allocation.

Proposed Rule 8.14(g) provides that DPM appointments may not be sold, assigned, or otherwise transferred without prior written approval of the Exchange. This provision clarifies that only the Exchange may authorize a firm to act as a DPM, which will allow the Exchange to ensure that a Participant is qualified to adequately perform DPM functions and fulfill its obligations and responsibilities as a DPM under the proposed DPM Rules.

Rule 8.15—Allocation of Securities to DPMs[7]

Proposed Rule 8.15 sets forth the manner in which the Exchange will allocate securities to DPMs. Proposed Rule 8.15(a) provides that the Exchange will determine for each security traded on the Exchange whether the security should be allocated to a DPM and, if so, to which DPM the security should be allocated. The proposed rule change could produce additional quotation volume in classes that are allocated to DPMs. The Exchange maintains a rigorous capacity planning program that monitors system performance and projected capacity demands and, as a general matter, considers the potential system capacity impact of all new initiatives. The Exchange has analyzed the potential for additional quote traffic resulting from the addition of DPMs and has concluded that the Exchange has sufficient system capacity to handle those additional quotes without degrading the performance of its systems. The Exchange also notes that any additional quote traffic will be limited, as the Exchange may allocate securities to DPMs on a class-by-class basis as opposed to allocating all classes to DPMs. Ultimately, the Exchange believes that it has the necessary systems capacity to allocate option classes to DPMs as described in this proposed rule change. The Exchange will monitor quoting volume associated with DPMs and its effect on C2's systems.

Proposed Rule 8.15(b) describes the criteria that the Exchange may consider in making allocation determinations.

[7] *See* CBOE Rule 8.95.

The factors the Exchange may consider when making these determinations include, but are not limited to, any one or more of the following: Performance, volume, capacity, market performance commitments, operational factors, efficiency, competitiveness, environment in which the security will be traded, expressed preferences of issuers, and recommendations of any Exchange committees. The following are some examples of the many ways in which these criteria may be applied:

- In considering performance, the Exchange may look at the market performance ranking of the applicable DPMs, as established by market performance reviews that are conducted by the Exchange.
- In considering volume, the Exchange may look at the anticipated trading volume of the security and the trading volume attributable to the applicable DPMs in determining which DPMs would be best able to handle the additional volume.
- In considering capacity, operational factors, and efficiency, the Exchange may look to criteria such as the number of Market-Makers or DPM personnel, the ability to process order flow, and the amount of DPM capital in determining which DPMs would be best able to handle additional securities.
- In considering marketing performance commitments, the Exchange may look at the pledges a DPM has made with respect to how narrow its bid-ask spreads will be and the number of contracts for which it will honor its disseminated market quotations beyond what is required by Exchange Rules.
- In considering competitiveness, the Exchange may look at percentage of volume attributable to a DPM in allocated securities that are multiply listed.
- In considering the environment in which the security will be traded, the Exchange may seek a proportionate distribution of securities between the Market-Maker system and the DPM system and across different DPMs.
- In considering expressed preferences of issuers, the Exchange may consider the views of the issuer of a security traded on the Exchange with respect to the allocation of that security or to the licensor of an index on which an index option is based with respect to the allocation of that index option.
- The Exchange may consider the recommendation of any Exchange committees, particularly those that evaluate DPM market performance.

Proposed Rule 8.15(c) provides that the Exchange may remove an allocation and reallocate the applicable security during a DPM's term if the DPM fails to adhere to any market performance commitments made by the DPM in connection with receiving the allocation. The Exchange typically requests that DPMs make market performance commitments as part of their applications to receive allocations of particular securities. As described above, these commitments may relate to pledges to keep bid-ask spreads within a particular width or to make disseminated quotes firm for a designated number of contracts beyond what is required by Exchange Rules. Proposed Rule 8.15(c) permits the Exchange to remove an allocation if these commitments are not met, which the Exchange believes will incentive [sic] DPMs to abide by these commitments. The Exchange believes these types of commitments will be instrumental in causing DPMs to quote more competitively.

Proposed Rule 8.15(c) also provides that the Exchange may change an allocation determination if it concludes that doing so is in the best interests of the Exchange based on operational factors or efficiency. For example, if, due to market conditions, trading volume in a security greatly increased over a very short time frame and the DPM allocated that security could not handle the additional order flow, the Exchange may deem it necessary to reallocate the security to another DPM with the capacity to do so. This provision will allow the Exchange to ensure that there is sufficient liquidity during trading hours in the allocated option classes.

Proposed Rule 8.15(d) provides that prior to taking any action to remove an allocation, the Exchange will generally give the DPM prior notice of the contemplated action and an opportunity to be heard concerning the action. The only exception to this requirement would be in those unusual situations when expeditious action is required due to extreme market volatility or some other situation requiring emergency action. Specifically, except when expeditious action is required, proposed Rule 8.15(d) requires that prior to taking any action to remove an allocation, the Exchange must notify the DPM involved of the reasons the Exchange is considering taking the contemplated action, and will either convene one or more informal meetings with the DPM to discuss the matter, or provide the DPM with the opportunity to submit a written statement to the Exchange concerning the matter. Due to the informal nature of the meetings provided for under proposed Rule 8.15(d) and in order to encourage constructive communication between the Exchange and the affected DPM at those meetings, ordinarily neither counsel for the Exchange nor counsel for the DPM will be invited to attend these meetings and no verbatim record of the meetings will be kept.

As with any decision made by the Exchange, any person adversely affected by a decision made by the Exchange to remove an allocation may appeal the decision to the Exchange under Chapter 19 of the Exchange Rules. The appeal procedures in Chapter 19 provide for the right to a formal hearing concerning any such decision and for the right to be accompanied, represented, and advised by counsel at all stages of the proceeding. In addition, any decision of the Exchange's Appeals Committee may be appealed to the Board of Directors pursuant to CBOE Rule 19.5 (which is incorporated into the Exchange Rules). The Exchange believes these hearing and appeal procedures will provide DPMs with appropriate due process with respect to decisions made regarding their DPM allocations and will promote a fair and fully informed decision-making process.

Proposed Rule 8.15(e) provides that the allocation of a security to a DPM does not convey ownership rights in the allocation or in the order flow associated with the allocation. Proposed Rule 8.15(e) is intended to make clear that DPMs may not buy, sell, or otherwise transfer an allocation and that, instead, the Exchange has the sole authority to determine allocations. As discussed above, DPM appointments may only be transferred with Exchange approval pursuant to proposed Rule 8.14(g).

Proposed Rule 8.15(f) provides that in allocating and reallocating securities to DPMs, the Exchange will act in accordance with any limitation or restriction on the allocation of securities that is established pursuant to another Exchange Rule. For example, the Exchange may take remedial action against a DPM for failure to satisfy minimum market performance standards, and such action may involve a restriction related to the allocation of securities to that DPM. Similarly, the Exchange may place restrictions on a DPM's ability to receive or retain allocations of securities pursuant to various provisions of these proposed Rules, including as a condition of appointment as a DPM (proposed Rule 8.14(d)), due to failure to perform DPM functions (proposed Rule 8.20(a)(2)), or due to a material financial or operational change (proposed Rule 8.20)(a)(1)). Proposed Rule 8.15(f) is intended to make clear that the

Exchange must act in accordance with any of these restrictions in making allocation determinations.

Proposed Rule 8.15, Interpretation and Policy .01 generally provides that the Exchange may reallocate a security at the end of a DPM's one-year term, in the event that the security is removed pursuant to another Exchange Rule from the DPM to which the security has been allocated, or in the event that for some other reason the DPM to which the security has been allocated no longer retains the allocation. For example, at the end of a DPM's term, the Exchange may allocate the security to the same DPM again (if the DPM applied for its appointment to be renewed and the Exchange approved the renewal application), to another DPM, or to no DPM. As another example, as described above, the Exchange may take remedial actions against DPMs in specified circumstances, including the removal of an allocation. Proposed Rule 8.15, Interpretation and Policy .01 is intended to clarify that in the event the Exchange removes an allocation pursuant to Exchange Rules, the Exchange will reallocate the security pursuant to proposed Rule 8.15. The only exception to this provision is that the Exchange is authorized pursuant to proposed Rule 8.14(f) to allocate to an interim DPM on a temporary basis a security that is removed from another DPM until the Exchange has made a final allocation of the security. As with several other proposed Rules, this provision is intended allow the Exchange to ensure that there is sufficient liquidity in allocated classes despite changing circumstances.

Rule 8.16—Conditions on the Allocation of Securities to DPMs [8]

Proposed Rule 8.16 allows the Exchange to establish (1) restrictions applicable to all DPMs on the concentration of securities allocable to a single DPM and to affiliated DPMs and (2) minimum eligibility standards applicable to all DPMs, which must be satisfied in order for a DPM to receive allocations of securities, including but not limited to standards relating to adequacy of capital and operational capacity (including number of personnel). Among the reasons for granting the Exchange the authority to limit the concentration of securities allocable to a single DPM and to affiliated DPMs is to promote competition in the Exchange's market and to help ensure that no DPM or group of affiliated DPMs is allocated such a large number of securities that it would be difficult for the Exchange to quickly reallocate those securities to other DPMs or Market-Makers in the event that for some reason the DPM or group of affiliated DPMs were no longer able to perform in that capacity. Among the reasons for granting the Exchange the authority to establish minimum eligibility standards for DPMs to receive allocations of securities is to help ensure that a DPM has the financial and operational ability to handle additional allocations of securities and meet its DPM obligations with respect to those securities. Similarly, the Exchange may utilize this proposed Rule to establish specific minimum market performance standards that must be satisfied by DPMs in order to receive allocations of securities so that a DPM that is not performing adequately with respect to the securities that have already been allocated to the DPM is not allocated additional securities.

Rule 8.17—DPM Obligations [9]

Proposed Rule 8.17 describes the obligations of a DPM. Proposed Rule 8.17(a) includes the general obligation with respect to each of its allocated securities to fulfill all of the obligations of a Market-Maker under Exchange Rules in addition to the requirements set forth in this proposed Rule.[10] Proposed Rule 8.17(a) requires each DPM:

(1) To provide continuous quotes in at least the lesser of 99% of the non-adjusted option series (as defined in Rule 8.5(a)(1)) or 100% of the non-adjusted option series minus one call-put pair of each option class allocated to it, with the term ''call-put pair'' referring to one call and one put that cover the same underlying instrument and have the same expiration date and exercise price, and assure that its disseminated market quotations are accurate; [11]

(2) to assure that each of its displayed market quotations are for the number of contracts required by Rule 8.6(a), ''Market-Maker Firm Quotes'';

(3) to segregate in a manner prescribed by the Exchange (a) all transactions consummated by the DPM in securities allocated to the DPM and (b) any other transactions consummated by or on behalf of the DPM that are related to the DPM's DPM business; [12]

(4) to not initiate a transaction for the DPM's own account that would result in putting into effect any stop or stop limit order that may be in the Book [13] and when the DPM guarantees that the stop or stop limit order will be executed at the same price as the electing transaction; [14] and

(5) to ensure that a trading rotation is initiated promptly following the opening of the underlying security (or promptly after 8:30 a.m. Central Time in an index class) in accordance with Rule 6.11 in 100% of the series of each allocated class by entering opening quotes as necessary.

Proposed Rule 8.17(b) provides that a DPM may not represent discretionary orders as an agent in its allocated classes.

Proposed Rule 8.17(c) lists additional obligations of a DPM, including that a DPM must:

(1) Resolve disputes relating to transactions in the securities allocated to the DPM, subject to Exchange official review, upon the request of any party to the dispute;

(2) make competitive markets on the Exchange and otherwise promote the Exchange in a manner that is likely to enhance the ability of the Exchange to compete successfully for order flow in the classes it trades;

(3) promptly inform the Exchange of any material change in the financial or operational condition of the DPM;

(4) supervise all persons associated with the DPM to assure compliance with the Exchange Rules;

(5) segregate in a manner prescribed by the Exchange the DPM's business and activities as a DPM from the DPM's other business and activities; [15] and

(6) continue to act as a DPM and to fulfill all of the DPM's obligations as a DPM until its DPM appointment has lapsed, the Exchange relieves the DPM

[8] *See* CBOE Rule 8.84.

[9] *See* CBOE Rule 8.85.

[10] To the extent there is any inconsistency between the specific obligations of a DPM set forth in proposed Rule 8.17 and the general obligations of a Market-Maker under the Exchange Rules, proposed Rule 8.17 will govern.

[11] For purposes of this provision, ''continuous'' means 90% of the time. If a technical failure or limitation of the System prevents a DPM from maintaining, or from communicating to the Exchange, timely and accurate quotes in a series, the duration of such failure will not be considered in determining whether that that [sic] DPM has satisfied the 99% quoting standard with respect to the series.

[12] This will permit the Exchange to monitor each DPM's trading positions in order to ensure that the DPM is in compliance with the financial and other requirements that are applicable DPMs.

[13] The term ''Book'' means the electronic book of buy and sell orders and quotes maintained by the System. The ''System'' is the automated trading system used by the Exchange for the trading of options contracts. *See* Rule 1.1.

[14] These restrictions apply to stop or stop limit orders only if the terms of such orders are visible to the DPM or if such orders are handled by the DPM.

[15] This requirement will help reduce the risk that a DPM's financial integrity will be adversely impacted by financial losses that may be incurred by the DPM in connection with its other businesses and activities.

of its approval and obligations to act as a DPM, or the Exchange terminates the DPM's approval to act as a DPM pursuant to proposed Rule 8.20.

Proposed Rule 8.17(d) provides that each person associated with a DPM will be obligated to comply with the provisions of proposed Rule 8.17(a) through (c) when acting on behalf of the DPM.

Proposed Rule 8.17(e) provides that each DPM must hold the number of Trading Permits as may be necessary based on the aggregate ''registration cost'' for the classes allocated to the DPM. Each Trading Permit held by the DPM has a registration cost of 1.0.[16] For example, if the Exchange allocates to a DPM classes with an aggregate registration cost of 1.6, the DPM would be required to hold two Trading Permits. The Exchange may change at any time the registration cost of any option class; upon any such change, each DPM will be required to hold the appropriate number of Trading Permits reflecting the revised registration costs of the classes that have been allocated to it. Additionally, a DPM is required to hold the appropriate number of Trading Permits at the time a new option class is allocated to it pursuant to proposed Rule 8.16 begins trading.

In the event a Participant approved as a DPM is also approved to act as a Market-Maker and has excess Trading Permit capacity above the aggregate registration cost for the classes allocated to it as the DPM, the Participant may utilize the excess Trading Permit capacity to quote in an appropriate number of classes in the capacity of a Market-Maker. For example, if the DPM has been allocated a number of option classes with an aggregate registration cost of 1.6, the Participant could request an appointment as a Market-Maker in any combination of option classes whose aggregate registration cost does not exceed 0.40. The Participant will not function as a DPM in any of these additional classes. In the event the Participant utilizes any excess Trading Permit capacity to quote in some additional classes as a Market-Maker, it must comply with the provisions of Rule 8.2.

Rule 8.17, Interpretation and Policy .01 clarifies that willingness of a DPM to promote the Exchange as a marketplace includes assisting in meeting and educating Participants (and taking the time for travel related thereto), maintaining communications with Participants in order to be responsive to suggestions and complaints, responding to suggestions and complaints, and other like activities.

The Exchange believes that these obligations will result in additional liquidity and competitive quoting in the allocated classes on C2's market, which could ultimately lead to additional order flow directed to the Exchange. The Exchange believes that these obligations will strengthen its market and are reasonable given the benefits conferred upon DPMs in exchange for these heightened obligations in the form of a participation entitlement, as discussed further below.

Rule 8.18—DPM Financial Requirements [17]

Proposed Rule 8.18 requires each DPM to maintain net liquidating equity in its DPM account of not less than $100,000. It also requires each DPM to maintain net capital sufficient to comply with the requirements of Rule 15c3–1 under the Act and requires each DPM that is a Clearing Participant [18] also to maintain net capital sufficient to comply with the requirements of The Options Clearing Corporation. Additionally, proposed Rule 8.18 requires DPMs to maintain net liquidating equity in their DPM accounts in conformity with any guidelines as the Exchange may establish from time to time. The Exchange expects to draft and use DPM financial guidelines in connection with the process for allocating securities to DPMs, and proposed Rule 8.18 would permit the Exchange to implement and enforce these guidelines as DPM financial requirements under Exchange Rules. The Exchange will announce these guidelines to Participants by Regulatory Circular. Although there are other rules that already subject DPMs to these financial requirements (and all Market-Makers must comply with the Act requirements applicable to specialists, including financial requirements), the Exchange believes that it is worthwhile to also include these requirements in proposed Rule 8.18 so that the proposed DPM Rules are more informative and complete.

Rule 8.19—Participation Entitlement of DPMs [19]

Rule 6.12 sets forth how the System prioritizes orders for execution purposes. Rule 6.12(a)(3) provides that the Exchange may prioritize orders using a price-time priority with primary priority for public customers and secondary priority for certain trade participation rights. Proposed Rule 8.19 grants to DPMs a trade participation right. Proposed Rule 8.19(a) gives the Exchange authority to determine the appropriate participation right for DPMs by providing that the Exchange, subject to review by the Exchange Board of Directors, may establish from time to time a participation entitlement formula that is applicable to all DPMs.

Proposed Rule 8.19(b)(1) provides that: (1) A DPM will be entitled to a participation entitlement only if quoting at the best bid or offer disseminated on the Exchange (''BBO''); (2) a DPM may not be allocated a total quantity greater than the quantity that the DPM is quoting at the BBO; and (3) the participation entitlement is based on the number of contracts remaining after all public customer orders in the Book at the BBO have been satisfied.

Proposed Rule 8.19(b)(2) provides that the collective DPM participation entitlement shall be: 50% when there is one Market-Maker also quoting at the BBO and 40% when there are two or more Market-Makers also quoting at the BBO. If only the DPM is quoting at the BBO (with no Market-Makers quoting at the BBO), the participation entitlement will not be applicable and the allocation procedures under Rule 6.12 will apply.

Proposed Rule 8.19(b)(3) provides that a DPM will not receive its participation entitlement in trades for which a Preferred Market-Maker (''PMM'') already received a participation entitlement pursuant to Rule 8.13, based on the priority determination made by the Exchange under Rule 6.12. This provision clarifies that only one trade participation right may be applied to the same trade (see the discussion of the proposed rule change to Rule 6.12(a) below). For example, if the Exchange has activated both a PMM participation right and DPM participation right in a class and determines under Rule 6.12 that a PMM has higher priority than a DPM, and a PMM receives its participation entitlement for a trade, then a DPM may not receive its participation entitlement for that trade.

Proposed Rule 8.19, Interpretation and Policy .01 provides that the Exchange may also establish a lower

[16] Rule 8.2(d) lists the registration costs for the classes of securities on the Exchange.

[17] *See* CBOE Rule 8.86.

[18] A ''Clearing Participant'' means a Permit Holder that has been admitted to membership in The Options Clearing Corporation (''OCC'') pursuant to the provisions of OCC rules. A ''Permit Holder'' means the Exchange recognized holder of a Trading Permit. A Permit Holder is also known as a Trading Permit Holder under the Exchange's Bylaws. Permit Holders are deemed ''members'' under the Act. *See* Rule 1.1.

[19] *See* CBOE Rule 8.90 [sic].

DPM participation rate on a product-by-product basis for newly listed products or products that are being allocated to a DPM for the first time. The Exchange will announce any lower participation rate to Participants by Regulatory Circular.

The Exchange believes that DPMs will play an important role in providing additional liquidity and more price competition because of the obligations imposed on DPMs by the proposed Rules, as discussed above. The Exchange also believes that the proposed participation entitlement, which DPMs may receive only when quoting at the best price, is an appropriate reward for DPMs' satisfaction of their DPM obligations, particularly given the overall benefit to the Exchange's market and customers that the additional DPM liquidity will create. Further, the Exchange believes that the limited percentage of the participation entitlement still provides other market participants with opportunities to be allocated a significant number of contracts in trades in which a DPM receives its participation entitlement. Similarly, the Exchange believes it is appropriate to only allow a PMM or DPM to receive its participation entitlement for a trade to further ensure that these opportunities are available to other market participants in classes with a DPM or PMM. While the Exchange believes that DPMs will add liquidity to the benefit of the market and customers, it is still important for all market participations to engage in price competition on the Exchange. This participation entitlement is part of the Exchange's careful balancing of the rewards and obligations of all types of Exchange Participants, which is part of the overall market structure designed to encourage vigorous price competition among Market-Makers, while still maximizing the benefits or price competition resulting from the entry of customer and non-customer orders, while encouraging Participants to provide market depth.

Rule 8.20—Termination, Conditioning, or Limiting Approval to Act as a DPM[20]

Proposed Rule 8.20 governs the termination, conditioning, and limiting of approval to act as a DPM. Rule 8.20(a) provides that the Exchange may terminate, place conditions upon, or limit a Participant's approval to act as a DPM if the Participant: (1) Incurs a material financial or operational; (2) fails to comply with any requirements under Exchange Rules regarding DPM obligations and responsibilities; or (3) is no longer eligible to act as DPM or be allocated a particular security or securities. Proposed Rule 8.20(a) also provides that before the Exchange may take any action to terminate, condition, or otherwise limit a Participant's approval to act as a DPM, the Participant will be given notice of such possible action and an opportunity to present any matter that it wishes the Exchange to consider in determining whether to take such action. These proceedings will be conducted in the same manner as the Exchange proceedings concerning DPM approvals described above.

Proposed Rule 8.20(b) provides an exception to this provision, which grants authority to the Exchange to immediately terminate, condition, or otherwise limit a Participant's approval to act as a DPM if the DPM incurs a material financial or operational warranting immediate action or if the DPM fails to comply with any of the financial requirements applicable to DPMs.

In addition, proposed Rule 8.20(c) provides that limiting a Participant's approval to act as a DPM may include, among other things, limiting or withdrawing a DPM's participation entitlement and withdrawing a DPM's right to act as DPM in one or more of its allocated securities.

As discussed above, it is important for the Exchange to have the sole authority to approve a Participant to act as a DPM (and allocate securities to a DPM) to ensure that the Participant is able to satisfy DPM obligations and perform DPM functions. Similarly, the Exchange needs authority to terminate, condition, or limit a DPM's approval when necessary to incentive DPMs to meet their DPM obligations and responsibilities in order to continue to receive the corresponding DPM benefits provided for in the proposed DPM Rules. In addition, if any of the circumstances set forth in proposed Rule 8.20(a) occurs, the Exchange's authority to terminate, condition, or limit a DPM's approval, and appoint another DPM if necessary (in the interim or permanently as discussed above), is essential to provide for uninterrupted DPM quoting in appointed classes and prevent any reduced liquidity in the DPM's allocated class that could otherwise result under these circumstances.

Proposed Rule 8.20(d) provides that if a Participant's approval to act as a DPM is terminated, conditioned, or otherwise limited by the Exchange pursuant to proposed Rule 8.20, the Participant may appeal that decision to the Appeals Committee under Chapter 19. Additionally, as is described above, these appeal procedures provide for the right to a formal Appeals Committee hearing concerning any such decision, and the decision of the Appeals Committee may be appealed to the Board of Directors. The advanced notice and appeal procedures are intended to ensure that DPMs receive appropriate due process with respect to their approvals to act as DPMs, as discussed above.

Rule 8.21—Limitations on Dealings of DPMs and Affiliated Persons of DPMs[21]

Proposed Rule 8.21 provides that a DPM must maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in option classes allocated to the DPM or act as a specialist or market-maker in any security underlying options allocated to the DPM, and otherwise comply with the requirements of CBOE Rule 4.18 (which is incorporated into the Exchange Rules) regarding the misuse of material non-public information. A DPM must provide its information barriers to the Exchange and obtain prior written approval. This provision is meant to prevent a Participant's non-DPM businesses from obtaining any benefits as a result of the Participant's status as a DPM.

Rule 6.12—Order Execution and Priority[22]

The proposed rule change amends Rule 6.12 to ensure that the Exchange's order execution and priority rule contemplates a participation entitlement for DPMs. The proposed rule change provides that both PMMs and DPMs may be granted participation rights up to the applicable participation right percentage designated in Rule 8.13 and 8.19, respectively. The Exchange may activate more than one trade participation right for an option class (including at different priority sequences), however in no case may more than one trade participation right be applied on the same trade.[23] The

[20] *See* CBOE Rule 8.90.

[21] *See* CBOE Rule 8.91.

[22] *See* CBOE Rules 6.45A(a)(ii)(2) and (iii) and 6.45B(a)(i)(2) and (iii).

[23] For example, the Exchange may activate both the PMM trade participation right of Rule 8.13 and the DPM trade participation right of Rule 8.20, along with other priorities that are allowed under Rule 6.12(a)(3), for an option class at the following priority levels: Public customer has first priority, Market Turner (*see* Rule 6.12(b)(1)) has second priority, PMM participation right has third priority, and DPM participation right has fourth priority. If a PMM's participation right is applied to a trade, then the DPM's participation right cannot be applied to that trade, and the trade would be allocated as follows: First to any public customers,

proposed rule change provides that, like for PMMs, (1) a DPM's order or quote must be at the best price on the Exchange; (2) a DPM may not be allocated a total quantity greater than the quantity that it is quoting (including orders not part of quotes) at that price; (3) in establishing the counterparties to a particular trade, the DPM's participation right must be first counted against its highest priority bids or offers; and (4) the DPM's participation right will only apply to any remaining balance of an order once all higher priorities are satisfied.

The proposed rule change also amends Rule 6.12 to add paragraph (b)(2), which will provide for an additional priority overlay for small orders that can be applied to each of the three matching algorithms. If the small order priority overlay is in effect for an option class,[24] then the following would apply:

• Orders for five contracts or fewer will be executed first by the DPM that is appointed to the option class; provided, however, that, on a quarterly basis, the Exchange will evaluate what percentage of the volume executed on the Exchange (excluding volume resulting from the execution of orders in C2's Automated Improvement Mechanism (''AIM'')—see Rule 6.51) is comprised of orders for five contracts or fewer executed by DPMs, and will reduce the size of the orders included in this provision if this percentage is over 40%.

• This procedure will only apply to the allocation of executions among non-customer orders and Market-Maker quotes existing in the Book at the time the Exchange receives the order. No market participant will be allocated any portion of an execution unless it has an existing interest at the execution price. Moreover, no market participant will be able to execute a greater number of contracts than is associated with the price of its existing interest. As a result, the small order preference contained in this allocation procedure will not be a guarantee; the DPM (1) must be quoting at the execution price to receive an allocation of any size, and (2) cannot execute a greater number of contracts than the size that is associated with its quote.

• If a PMM is not quoting at a price equal to the national best bid or offer (the ''NBBO'') at the time a preferred order is received, the allocation procedure for small orders described above will be applied to the execution of the preferred order (i.e., it will be executed first by the DPM). If a PMM is quoting at the NBBO at the time the preferred order is received, the allocation procedure in place for all other sized orders in the class will be applied to the execution of the preferred order, except that any Market Turner status will not apply (e.g., if the default matching algorithm is price-time with a public customer and participation entitlement overlay, the order will execute first against any public customer orders, then the PMM would receive its participation entitlement, then the remaining balance would be allocated on a price-time basis).

• The small order priority overlay will only be applicable to automatic executions and will not be applicable to any auctions.[25]

Lastly, like the existing priority overlays, the small order priority overlay is optional. The Exchange will announce all determinations under this Rule by Regulatory Circular.

As described above, the Exchange believes that because DPMs will have unique obligations to the C2 market,[26] they should be provided with certain participation rights. Under the proposed DPM Rules in this filing, if the DPM is one of the Participants with a quote at the best price, the participation entitlement will generally equal to 50% when there is one Market-Maker also quoting at the BBO or 40% when there are two or more Market-Makers also quoting at the BBO.[27] This proposed priority overly [sic] will make available an allocation procedure that provides that the DPM has precedence to execute orders of five contracts or fewer. The Exchange believes that this small order priority overlay will not necessarily result in a significant portion of the Exchange's volume being executed by the DPM. As stated above, the DPM would execute against these small orders only if it is quoting at the best price, and only for the number of contracts associated with its quotation. Nevertheless, the Exchange will evaluate what percentage of the volume executed on the Exchange is comprised of orders for five contracts or fewer executed by DPMs, and will reduce the size of the orders included in this provision if this percentage is over 40%.

C2 considered this small order priority overlay as part of its balancing of DPM obligations and benefits described above and believes this priority overlay, which includes participation rights for DPMs only when they are quoting at the best price, helps strike an appropriate balance of these obligations and benefits.

Other Changes

Rule 1.1—Definitions

The proposed rule change amends Rule 1.1 to define the term ''BBO'' as the best bid or offer disseminated on the Exchange. The Exchange proposes to include this definition to clarify its meaning in the Exchange Rules because the term is used throughout the proposed DPM Rules as well as other Exchange Rules.

Rule 17.50—Minor Rule Violation Plan[28]

The proposed rule change also amends Rule 17.50(g)(14) to add DPM quoting obligations to the Exchange's Minor Rule Violation Plan (''MRVP'') provision regarding C2 Market-Maker quoting obligations. This will allow the Exchange to impose sanctions upon DPMs for failing to meet their quoting obligations pursuant to the MRVP, as it does for Market-Makers and PMMs. C2 believes these violations are suitable for inclusion in the MRVP because they are generally technical in nature, allowing C2 to carry out its regulatory responsibilities more quickly and efficiently with respect to Market-Maker quoting obligations. For violations of DPM's quoting obligations, the Exchange may assess fines ranging from $2,000 to $4,000 for a first offense and $4,000 to $5,000 for a second offense, and may assess a fine of $5,000 or refer to C2's Business Conduct Committee any subsequent offenses. The Exchange notes that these fine amounts are the same as the amounts currently imposed on Market-Makers for violations of their quoting obligations under the MRVP.

C2 will maintain internal guidelines that dictate the sanctions that will be imposed for a particular violation (based on the degree of the violation). As with all other violations in C2's MRVP, C2

second to the Market Turner, third to the PMM's participation right, and the remainder to other orders in price-time priority. However, if a PMM's participation right was not applied to the trade, then the DPM's participation right could be applied to the trade, and the trade would be allocated as follows: First to any public customers, second to the Market Turner, third to the DPM's participation right, and the remainder to other orders in price-time priority.

[24] As set forth in Rule 6.12(b), the Exchange may determine to apply, on a series-by-series basis, any additional priority overlays in subparagraph (b) in a sequence determined by the Exchange.

[25] In addition to AIM, C2 has various electronic auctions that are described under Rules 6.14, ''Simple Auction Liaison,'' and 6.52, ''Solicitation Auction Mechanism.'' Each of these auctions generally allocates executions pursuant to the matching algorithm in effect for the options class with certain exceptions noted in the respective rules.

[26] *See* proposed Rule 8.17, ''DPM Obligations.''

[27] *See* proposed amendment to Rule 6.12(a) and proposed Rule 8.19, ''Participation Entitlement of DPMs.''

[28] *See* CBOE Rule 17.50(g)(14).

will retain the ability to refer a violation of DPM quoting obligations to its Business Conduct Committee should the circumstances warrant this referral.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[29] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [30] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that adopting a DPM program will protect investors and the public interest, because it will help generate greater order flow for the Exchange in appointed classes and provide additional incentives for DPMs to trade with that order flow, which in turn adds depth and liquidity to C2's market and ultimately benefits all market participants. The Exchange believes this deeper liquidity will make C2 more competitive with other markets that trade those classes, which will also help remove impediments to and perfect the mechanism for a free and open market.

Additionally, the Exchange believes that adopting a DPM program will promote just and equitable principles of trade, as it will require DPMs to assist in the maintenance of a fair and orderly market, as reasonably practicable, and maintain net capital consistent with federal requirements for market-makers. These proposed Rules impose many obligations on DPMs, including continuous two-sided quoting obligations, which will ensure that DPMs provide significant liquidity in their allocated classes to the benefit of all C2 market participants, and operational capacity requirements, which will ensure that DPMs are capable of carrying out their obligations, as well as eligibility requirements and market performance standards. The proposed Rules also allow the Exchange to impose conditions on DPMs or their allocations to further ensure that DPMs are providing appropriate depth and liquidity in their allocated classes.

In light of these obligations, the Exchange also proposed to provide DPMs with the benefit of a participation entitlement that may receive higher priority for trades than other Participants, subject to the requirements set forth in proposed Rule 8.19(b)(1), as well as a small order priority overlay, subject to the requirements set forth in proposed Rule 6.12(b)(2). While these trade priorities may reduce the number of contracts that other Participants may execute in trades in which the DPM participation entitlement, or small order priority overlay is applied, the Exchange believes this fact is outweighed by the benefit of the additional liquidity and more competitive pricing that DPMs will provide to the market in their appointed classes, ultimately resulting in a net benefit to Exchange customers. These trade priorities are part of the balancing of C2's overall market structure, which is designed to encourage vigorous price competition between Market-Makers on the Exchange, as well as maximize the benefits of price competition resulting from the entry of customer and non-customer orders, while encouraging Participants to provide market depth. Therefore, the Exchange believes the obligations proposed to be imposed on DPMs are offset by the benefits proposed to be conferred upon DPMs.

In addition, the Exchange believes that the approval and allocation procedures and policies will ensure that Participants are approved to act as DPMs and securities traded on the Exchange are allocated in an equitable manner, and that all DPMs will have a fair opportunity for approvals and allocations based on established criteria and procedures. The proposed rules that give the Exchange the authority to terminate, limit, or condition DPM approvals or reallocate securities will allow the Exchange to ensure that its market maintains an uninterrupted high level of liquidity for customers in allocated classes, even when unusual or changing market circumstances exist. Further, the Exchange believes that the advanced notice provisions and appeal procedures that the proposed rules put in place for all determinations made by the Exchange with respect to DPM approvals and allocations, including termination and reallocation decisions, are reasonable procedures that will create a fair and equitable decision-making process with respect to DPMs.

The Exchange believes the proposed rule change to add violations of DPM quoting obligation to C2's MRVP will strengthen C2's ability to carry out its regulatory responsibilities as a self-regulatory organization pursuant to the Act and reinforce its surveillance and enforcement functions.

The Exchange believes that adding the definition of BBO to the Rules protects investors and the public interest, as it clarifies the meaning of this term, which is used throughout the proposed DPM Rules and other Exchange Rules, for investors.

Finally, the Exchange believes that the proposed rule change is consistent with the requirements of the Act because, as the Exchange notes above, the proposed requirements for DPMs are based primarily on existing requirements for DPMs on another exchange (CBOE).

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–C2–2012–024 on the subject line.

[29] 15 U.S.C. 78f(b).

[30] 15 U.S.C. 78f(b)(5).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–C2–2012–024. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of C2. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–C2–2012–024 and should be submitted on or before September 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–22059 Filed 9–6–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Environmental Impact Statement for the Northeast Corridor Between Washington, DC, New York, NY, and Boston, MA

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice of intent to extend the formal comment period for scoping to October 19, 2012.

SUMMARY: FRA is issuing this Notice of Intent (Notice) to advise the public and Federal, state, and local agencies of the extension of the formal comment period for the NEC FUTURE program scoping process. The Notice of Intent to prepare a Tier 1 Environmental Impact Statement (EIS) to evaluate potential passenger rail improvements between Washington, DC, New York City, and Boston, MA was published in the **Federal Register** on June 22, 2012. The formal comment period for scoping was scheduled to close on Friday, September 14, 2012. In response to requests from the public provided in public testimony at Scoping meetings held from August 13th through August 22nd at nine different venues between Washington, DC and Boston, Massachusetts, FRA has decided to extend the formal comment period until Friday, October 19, 2012.

DATES: Comment period extended from Friday, September 14, 2012 to Friday, October 19, 2012.

ADDRESSES: Interested parties are encouraged to comment on-line at the NEC FUTURE Web site (*www.necfuture.com*), via email at *info@necfuture.com,* or by mail at the address below. For Further Information or Special Assistance Contact: Rebecca Reyes-Alicea, USDOT, Federal Railroad Administration, Office of Railroad Policy & Development, Mail Stop 20, 1200 New Jersey Avenue SE., Washington, DC 20590; by email at *info@necfuture.com;* or through the NEC FUTURE Web site (*www.necfuture.com*).

SUPPLEMENTARY INFORMATION: FRA is leading the planning and environmental evaluation of the Northeast Corridor (NEC) in close coordination with the involved states, Northeast Corridor Infrastructure and Operations Advisory Commission (NEC Commission), Amtrak, and other stakeholders. The purpose of the NEC FUTURE program is to define current and future markets for improved rail service and capacity on the NEC, develop an integrated passenger rail transportation solution to incrementally meet those needs, and create a regional planning framework to engage stakeholders throughout the region in the development of the program.

The materials that were presented at the Scoping meetings held from August 13th to August 22nd, including a narrated PowerPoint presentation and display boards, will be available on the NEC FUTURE Web site (*www.necfuture.com*). To ensure that all significant issues are identified and considered, all interested parties are invited to comment on the proposed scope of environmental review, project purpose and need, alternatives to be considered, environmental effects to be considered and evaluated, and methodologies to be used for evaluating effects. Persons with limited internet access may request a hard copy of the Public Scoping meeting materials by contacting Rebecca Reyes-Alicea at the mailing address above. Please direct comments or questions concerning the proposed action and the Tier 1 EIS to the FRA at the above address.

Issued in Washington, DC, on August 31, 2012.

Paul Nissenbaum,

Associate Administrator of Rail Policy and Development, Federal Railroad Administration.

[FR Doc. 2012–22060 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Meeting of the Transit Rail Advisory Committee for Safety (TRACS)

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of meeting.

SUMMARY: This notice announces a public meeting of the Transit Rail Advisory Committee for Safety (TRACS). TRACS is a Federal Advisory Committee established by the Secretary of Transportation in accordance with the Federal Advisory Committee Act to provide information, advice, and recommendations to the Secretary and the Federal Transit Administrator on matters relating to the safety of public transportation systems.

DATES: The TRACS meeting will be held on September 20, 2012, from 8:30 a.m. to 5 p.m., and September 21, 2012, from 8:30 a.m. to 12:00 p.m. Contact Iyon Rosario (see contact information below) by September 13, 2012, if you wish to be added to the visitor's list to gain access to the Washington Navy Yard Conference Center.

ADDRESSES: The meeting will be held at the Washington Navy Yard Conference Center (Navy Yard), Building 211, 1454 Parsons Avenue SE., Washington, DC 20374. Attendees who are on the visitor's/security list can access all three gates (6th St, 9th St, 11th St) by presenting a photo ID to gain entrance to the Navy Yard. The gate in closest

[31] 17 CFR 200.30–3(a)(12).

proximity to the Washington Navy Yard Conference Center is the gate located on 9th and M Streets, SE. Although this meeting is open to the public, the Navy Yard is a secure government facility. Attendees (both pedestrians and vehicle driver) who have not pre-registered with FTA, must use the Visitor's Gate at 11th and O Streets, SE.

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2). As noted above, TRACS is a Federal Advisory Committee established to provide information, advice, and recommendations to the Secretary of Transportation and the Administrator of the Federal Transit Administration (FTA) on matters relating to the safety of public transportation systems. TRACS is composed of 24 members representing a broad base of expertise necessary to discharge its responsibilities. The first meeting of TRACS was held on September 9–10, 2010, the second meeting of TRACS was held on April 27–28, 2011, and the third meeting of TRACS was held on February 23–24, 2012. The tentative agenda for the fourth meeting of TRACS is set forth below:

Agenda

September 20–21, 2012

(1) Welcome Remarks/Introductions
(2) Facility Use/Safety Briefing
(3) MAP–21 Presentation
(4) Recap of TRACS Activities
(5) Future TRACS Activities/ Deliverables
(6) Public Comments
(7) Wrap Up

As previously noted, this meeting will be open to the public; however, the Navy Yard is a secured facility and persons wishing to attend must contact Iyon Rosario, Office of Safety and Security, Federal Transit Administration, (202) 366–2010; or at *TRACS@dot.gov* by close of business September 13, 2012, to have your name added to the security list. Members of the public who wish to make an oral statement at the meeting or seeking special accommodations, are also directed to make a request to Iyon Rosario, Office of Safety and Security, Federal Transit Administration; (202) 366–2010; at *TRACS@dot.gov* on or before the close of business September 13, 2012. Provisions will be made to include oral statements on the agenda, if needed. Members of the public may submit written comments or suggestions concerning the activities of TRACS at any time before or after the meeting at *TRACS@dot.gov*; or to U.S. Department of Transportation, Federal Transit Administration, Office of Safety and Security, Room E45–312, 1200 New Jersey Avenue SE., Washington, DC 20590, Attention: Iyon Rosario. Information from the meeting will be posted on FTA's public Web site at *http://www.fta.dot.gov* on the TRACS Meeting Minutes page. Written comments submitted to TRACS will also be posted at the above web address.

Issued on: September 4, 2012.

Peter Rogoff,

Administrator.

[FR Doc. 2012–22075 Filed 9–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Marine Transportation System National Advisory Council

ACTION: National Advisory Council public meeting.

SUMMARY: The Maritime Administration announces that the Marine Transportation System National Advisory Council (MTSNAC) will hold a meeting to discuss preliminary recommendations that have been developed by the Shipbuilding Subcommittee to support increased efficiency in vessel financing mechanisms and provide adequate ship capacity for marine highway services.

DATES: The meeting will be held on Friday, September 21, 2012, from 11:00 a.m.–1:00 p.m. (EDT).

ADDRESSES: The meeting will be conducted in a webinar format. To access the webinar, please contact Richard Lolich at the Maritime Administration as indicated below.

FOR FURTHER INFORMATION CONTACT: Richard Lolich, (202) 366–0704; Maritime Administration, MAR–540, Room W21–310, 1200 New Jersey Ave. SE., Washington, DC 20590–0001; *richard.lolich@dot.gov.*

Authority: 5 U.S.C. App 2, Sec. 9(a)(2); 41 CFR 101–6. 1005; DOT Order 1120.3B.

Dated: August 27, 2012.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. 2012–21724 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0086]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SOTITO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before October 9, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0086. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SOTITO is:

Intended Commercial Use of Vessel: Passenger charters and harbor tours.

Geographic Region: Rhode Island, New York, Connecticut, Massachusetts, New Jersey.

The complete application is given in DOT docket MARAD–2012–0086 at *http://www.regulations.gov.* Interested parties may comment on the effect this

action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: August 28, 2012.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–21985 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0105]

Decision That Certain Nonconforming Motor Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Grant of Petitions.

SUMMARY: This document announces decisions by NHTSA that certain motor vehicles not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for sale in the United States and certified by their manufacturers as complying with the safety standards, and they are capable of being readily altered to conform to the standards or because they have safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS.

DATES: These decisions became effective on the dates specified in Annex A.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202–366–5308).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and/or sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Where there is no substantially similar U.S.-certified motor vehicle, 49 U.S.C. 30141(a)(1)(B) permits a nonconforming motor vehicle to be admitted into the United States if its safety features comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

NHTSA received petitions from registered importers to decide whether the vehicles listed in Annex A to this notice are eligible for importation into the United States. To afford an opportunity for public comment, NHTSA published notice of these petitions as specified in Annex A. The reader is referred to those notices for a thorough description of the petitions.

Comments: No substantive comments were received in response to the subject petitions.

NHTSA Decision: Accordingly, on the basis of the foregoing, NHTSA hereby decides that each motor vehicle listed in Annex A to this notice, which was not originally manufactured to comply with all applicable FMVSS, is either substantially similar to a motor vehicle manufactured for importation into and/or sale in the United States, and certified under 49 U.S.C. 30115, as specified in Annex A, and is capable of being readily altered to conform to all applicable FMVSS or has safety features that comply with, or is capable of being altered to comply with, all applicable Federal Motor Vehicle Safety Standards.

Vehicle Eligibility Number for Subject Vehicles: The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. Vehicle eligibility numbers assigned to vehicles admissible under this decision are specified in Annex A.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: August 30, 2012.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

ANNEX A

Nonconforming Motor Vehicles Decided to be Eligible for Importation

1. Docket No. NHTSA–2011–0181

Nonconforming Vehicles: 1999 Volkswagen Bora Passenger Car.

Substantially Similar U.S. Certified Vehicles: 1999 Volkswagen New Jetta Passenger Car.

Notice of Petition

Published at: 77 FR 5303 (February 2, 2012).

Vehicle Eligibility Number: VSP–540 (effective date August 8, 2012).

2. Docket No. NHTSA–2012–0035

Nonconforming Vehicles: 1999–2006 Toyota Land Cruiser IFS 100 Series Multipurpose Passenger Vehicles Manufactured prior to September 1, 2006.

Substantially Similar U.S. Certified Vehicles: 1999–2006 Toyota Land Cruiser IFS 100 Series Multipurpose Passenger Vehicles Manufactured prior to September 1, 2006.

Notice of Petition

Published at: 77 FR 20485 (April 4, 2012).

Vehicle Eligibility Number: VSP–539 (effective date July 27, 2012).

3. Docket No. NHTSA–2012–0040

Nonconforming Vehicles: 2006 Left-Hand Drive Land Rover Range Rover Multipurpose Passenger Vehicles Manufactured prior to September 1, 2006.

Substantially Similar U.S. Certified Vehicles: 2006 Left-Hand Drive Land Rover Range Rover Multipurpose Passenger Vehicles Manufactured prior to September 1, 2006.

Notice of Petition

Published at: 77 FR 24264 (April 23, 2012).

Vehicle Eligibility Number: VSP–538 (effective date August 8, 2012).

4. Docket No. NHTSA–2011–0182

Nonconforming Vehicles: 2000–2003 Kawasaki ZR750 Motorcycles.

Substantially Similar U.S. Certified Vehicles: 2000–2003 Kawasaki ZR750 Motorcycles.

Notice of Petition

Published at: 76 FR 82039 (December 29, 2011).

Vehicle Eligibility Number: VSP–537 (effective date February 22, 2012).

5. Docket No. NHTSA–2011–0158

Nonconforming Vehicles: 2002 Jaguar XJ8 Passenger Cars Manufactured for Sale in the Kuwaiti Market.

Substantially Similar U.S. Certified Vehicles: 2002 Jaguar XJ8 Passenger Cars.

Notice of Petition

Published at: 76 FR 69796 (November 9, 2011).

Vehicle Eligibility Number: VSP–536 (effective date December 20, 2011).

6. Docket No. NHTSA–2011–0113

Nonconforming Vehicles: 2009 Dodge RAM 1500 Laramie Crew Cab Trucks Manufactured for the Mexican Market.

Substantially Similar U.S. Certified Vehicles: 2009 Dodge RAM 1500 Laramie Crew Cab Trucks.

Notice of Petition

*Published a*t: 76 FR 49834 (August 11, 2011).

Vehicle Eligibility Number: VSP–535 (effective date September 21, 2011).

7. Docket No. NHTSA–2012–0031

Nonconforming Vehicles: Right-Hand Drive 2000–2003 Jeep Wrangler Multi-Purpose Passenger Vehicles.

Because there are no substantially similar U.S.-certified version Right-Hand Drive 2000–2003 Jeep Wrangler Multi-Purpose Passenger Vehicles the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).

Notice of Petition

Published at: 77 FR 17567 (March 26, 2012).

Vehicle Eligibility Number: VCP–50 (effective date July 27, 2012).

8. Docket No. NHTSA–2012–0030

Nonconforming Vehicles: 2005 Ifor Williams LM85G Trailers.

Because there are no substantially similar U.S.-certified version 2005 Ifor Williams LM85G Trailers the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).

Notice of Petition

Published at: 77 FR 17568 (March 26, 2012).

Vehicle Eligibility Number: VCP–49 (effective date May 7, 2012).

9. Docket No. NHTSA–2011–0157

Nonconforming Vehicles: 1987–1994 ALPINA Burkard Bovensiepen GmbH B11 Sedan Model Passenger Cars.

Because there are no substantially similar U.S.-certified version 1987–1994 ALPINA Burkard Bovensiepen GmbH B11 Sedan Model Passenger Cars the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).

Notice of Petition

Published at: 76 FR 69323 (November 8, 2011).

Vehicle Eligibility Number: VCP–48 (effective date December 19, 2011).

[FR Doc. 2012–22034 Filed 9–6–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35666]

Union Pacific Railroad Company—Acquisition and Operation Exemption—San Pedro Railroad Operating Company, LLC

Union Pacific Railroad Company (UP) has filed a verified notice of exemption under: (1) 49 CFR 1180.2(d)(1) to acquire and operate over San Pedro Railroad Operating Company, LLC's (SPROC) line segments between MP 1040.15 at Curtiss, Ariz., and MP 1041.32 near Curtiss (Parcel 1), and between MP 1071.16 and MP 1084 at Naco, Ariz. (Parcel 2), and to acquire all of SPROC's property rights, including SPROC's freight operating easement, in a line segment between MP 1041.32 and MP 1071.16 (Parcel 3),[1] whose underlying right-of-way UP currently owns, and to operate over the same; and (2) 49 CFR 1180.2(d)(7) to acquire overhead trackage rights over a line between MP 1033.008 at Benson, Ariz., and MP 1040.15 at Curtiss (Leased Line), that SPROC currently leases from UP and operates.[2]

The earliest this transaction may be consummated is September 22, 2012, the effective date of the exemption (30 days after the exemption was filed).

According to UP, the purpose of assuming the rail operations over Parcels 1, 2, and 3, and acquiring the overhead trackage rights over the Leased Line is to maintain continuity of railroad service on the Curtiss Branch Line and preserve the Curtiss Branch Line for future and improved railroad service. UP states that acquiring the overhead trackage rights over the Leased Line would also provide the connection necessary for UP to serve and operate the southern portion of the Curtiss Branch Line.

In support of the exemption filed under § 1180.2(d)(1), UP states the Board previously granted SPROC the authority to abandon Parcels 1, 2, and 3, and that UP's acquisition of, and authority to operate over, those portions would not constitute a major market extension for UP because: (1) The Curtiss Branch Line does not extend to the international border with Mexico; (2) the Curtiss Branch Line is not in or near any major commercial markets or rail routes; (3) except for the Leased Line, the entire Curtiss Branch Line was approved for abandonment by the Board; and (4) UP currently retains real property ownership of the majority of the right-of-way that makes up the Curtiss Branch Line. In support of the exemption filed under § 1180.2(d)(7), the overhead trackage rights sought by UP over the Leased Line are based on a written agreement and such rights were neither filed nor sought by UP in a responsive application in a rail consolidation proceeding.

The acquisition exemption is subject to the conditions for the protection of railroad employees in *New York Dock Railway—Control—Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway* v. *United States,* 609 F.2d 83 (2d Cir. 1979), *as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc.,* 6 I.C.C. 2d 799, 814–26 (1990), *aff'd sub nom. Railway Labor Executives' Association* v. *ICC,* 930 F.2d 511 (6th Cir. 1991). As a condition to the trackage rights exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of

[1] In *San Pedro Railroad Operating Company, LLC—Abandonment Exemption—In Cochise County, Ariz.,* AB 1081X (STB served Feb. 3, 2006), the Board granted SPROC an exemption to abandon approximately 76.2 miles of railroad in Cochise County, Ariz., including Parcels 1, 2, and 3 at issue here. SPROC has sought, and received from the Board, numerous extensions of the abandonment authority consummation deadline for Parcels 1, 2, and 3, the last of which set the consummation deadline at September 24, 2012. *San Pedro R.R. Operating Co.—Aban. Exemption—In Cochise Cnty., Ariz.,* AB 1081X (STB served July 5, 2012).

[2] UP has included a copy of the proposed trackage rights agreement between UP and SPROC and states that a copy of the signed agreement will be filed with the Board within 10 days of the filing of the subject verified noticed of exemption.

a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by September 14, 2012 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35666, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Mack H. Shumate, Jr., Union Pacific Railroad Company, Law Department, 101 North Wacker Drive, Room 1920, Chicago, IL 60606.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: August 31, 2012.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–22005 Filed 9–6–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on September 17–18, 2012, at the Veterans Health Administration National Conference Center, 2011 Crystal Drive, Suite 150A, Arlington, Virginia. The sessions will begin at 8:30 a.m. and end at 4 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and other VA benefits programs. Time will be allocated for receiving public comments in the afternoon. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Sarah Fusina, Esq., Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration, Compensation Service, Regulation Staff (211D), 810 Vermont Avenue NW., Washington, DC 20420 or email at *Sarah.Fusina@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Mrs. Fusina at (202) 461–9569.

Dated: August 31, 2012.

By direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–22008 Filed 9–6–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Reasonable Charges for Inpatient MS–DRGs and SNF Medical Services; V3.11, 2013; Fiscal Year Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Section 17.101 of Title 38 of the Code of Federal Regulations sets forth the Department of Veterans Affairs (VA) medical regulations concerning ''Reasonable Charges'' for medical care or services provided or furnished by VA to a veteran:

—For a nonservice-connected disability for which the veteran is entitled to care (or the payment of expenses of care) under a health plan contract;

—For a nonservice-connected disability incurred incident to the veteran's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; or

—For a nonservice-connected disability incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations insurance.

The regulations include methodologies for establishing billed amounts for the following types of charges: Acute inpatient facility charges; skilled nursing facility/sub-acute inpatient facility charges; partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by Healthcare Common Procedure Coding System (HCPCS) Level II codes. The regulations also provide that data for calculating actual charge amounts at individual VA facilities based on these methodologies will either be published in a notice in the **Federal Register** or will be posted on the Internet site of the Veterans Health Administration (VHA) Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Sources.'' Certain charges are hereby updated as described in the **SUPPLEMENTARY INFORMATION** section of this notice. These changes are effective October 1, 2012.

When charges for medical care or services provided or furnished at VA expense by either VA or non-VA providers have not been established under other provisions of the regulations, the method for determining VA's charges is set forth at 38 CFR 17.101(a)(8).

FOR FURTHER INFORMATION CONTACT: Romona Greene, Chief Business Office (10NB6), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–1595. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Of the charge types listed in the **SUMMARY** section of this notice, only the acute inpatient facility charges and skilled nursing facility/sub-acute inpatient facility charges are being changed. Charges are not being changed for: Partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by HCPCS Level II codes. These outpatient facility charges and professional charges remain the same as set forth in a notice published in the **Federal Register** on December 12, 2011 (76 FR 77328).

Based on the methodologies set forth in 38 CFR 17.101(b), this document provides an update to acute inpatient charges that were based on 2012 Medicare severity diagnosis related groups (MS–DRGs). Acute inpatient facility charges by MS–DRGs are set forth in Table A and are posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' This Table A corresponds to the Table A referenced in the September 28, 2011, **Federal Register** Notice. Table A referenced in this notice provides updated charges based on 2013 MS–DRGs and will replace Table A posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table A referenced in the September 28, 2011, **Federal Register** notice.

Also, this document provides for an updated all-inclusive per diem charge for skilled nursing facility/sub-acute inpatient facility charge using the methodologies set forth in 38 CFR 17.101(c), and it is adjusted by a geographic area factor based on the location where the care is provided (See Table ''N'' Acute Inpatient and Table ''O'' SNF geographic factors found on the Web site under ''Reasonable Charges Data Tables''). The skilled nursing facility/sub-acute inpatient facility per diem charge is set forth in Table B and is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' This Table B corresponds to the Table B referenced in the September 28, 2011, **Federal Register** Notice. Table B referenced in this notice provides updated all-inclusive nationwide skilled nursing facility/sub-acute inpatient facility per diem charge and will replace Table B posted on the Internet site of the VHA Chief Business Office, which corresponds to the Table B referenced in the September 28, 2011, **Federal Register** notice.

The charges in this update for acute inpatient facility and skilled nursing facility/sub-acute inpatient facility services are effective October 1, 2012.

In this update, we are retaining the table designations used for acute inpatient facility charges by MS–DRGs which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' We also are retaining the table designation used for skilled nursing facility/sub-acute inpatient facility charges which is posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Tables.'' Accordingly, the tables identified as being updated by this notice correspond to the applicable tables referenced in the September 28, 2011, notice, beginning with Table A through Table B.

The list of data sources presented in Supplementary Table 1 will be posted on the Internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''Reasonable Charges Data Sources'' to reflect the updated data sources used to establish the updated charges described in this notice.

We have also updated the list of VA medical facility locations. As a reminder, in Supplementary Table 3 posted on the internet site of the VHA Chief Business Office, currently at *http://www1.va.gov/CBO/apps/rates/index.asp,* under ''VA Medical Facility Locations,'' we set forth the list of VA medical facility locations, which includes the first three digits of their ZIP Codes and provider-based/non-provider-based designations.

Consistent with VA's regulations, the updated data tables and supplementary tables containing the changes described in this notice will be posted on the Internet site of the VHA Chief Business Office, ''Reasonable Charges (Rates) Information'' page currently at *http://www1.va.gov/CBO/apps/rates/index.asp.*

Approved: August 30, 2012.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2012–22049 Filed 9–6–12; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 77 Friday,
No. 174 September 7, 2012

Part II

Bureau of Consumer Financial Protection

12 CFR Part 1026
Truth in Lending Act (Regulation Z); Loan Originator Compensation; Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2012–0037]

RIN 3170–AA13

Truth in Lending Act (Regulation Z); Loan Originator Compensation

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection is publishing for public comment a proposed rule amending Regulation Z (Truth in Lending) to implement amendments to the Truth in Lending Act (TILA) made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The proposal would implement statutory changes made by the Dodd-Frank Act to Regulation Z's current loan originator compensation provisions, including a new additional restriction on the imposition of any upfront discount points, origination points, or fees on consumers under certain circumstances. In addition, the proposal implements additional requirements imposed by the Dodd-Frank Act concerning proper qualification and registration or licensing for loan originators. The proposal also implements Dodd-Frank Act restrictions on mandatory arbitration and the financing of certain credit insurance premiums. Finally, the proposal provides additional guidance and clarification under the existing regulation's provisions restricting loan originator compensation practices, including guidance on the application of those provisions to certain profit-sharing plans and the appropriate analysis of payments to loan originators based on factors that are not terms but that may act as proxies for a transaction's terms.

DATES: Comments must be received on or before October 16, 2012, except for comments on the Paperwork Reduction Act analysis in part IX of this document, which must be received on or before November 6, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2012–0037 or RIN 3170–AA13, by any of the following methods:

- *Electronic: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

Instructions: All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Daniel C. Brown and Michael G. Silver, Counsels; Krista P. Ayoub and R. Colgate Selden, Senior Counsels; Paul Mondor, Senior Counsel & Special Advisor; Charles Honig, Managing Counsel: Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

A. Background

The mortgage market crisis focused attention on the critical role that loan officers and mortgage brokers play in the loan origination process. Because consumers generally take out only a few home loans over the course of their lives, they often rely heavily on loan officers and brokers to guide them. But prior to the crisis, training and qualification standards for loan originators varied widely, and compensation was frequently structured to give loan originators strong incentives to steer consumers into more expensive loans. Often, consumers paid loan originators an upfront fee without realizing that their creditors also were paying the loan originators commissions that increased with the price of the loan.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] expanded on previous efforts by lawmakers and regulators to strengthen loan originator qualification requirements and regulate industry compensation practices. The Bureau is proposing new rules to implement the Dodd-Frank Act requirements, as well as to revise and clarify existing regulations and guidance on loan originator compensation.

The Bureau is also proposing rules to implement a new Dodd-Frank Act requirement that appears to be designed to address broader consumer confusion about the relationship between certain upfront charges and loan interest rates. Specifically, for mortgage loans in which a brokerage firm or creditor pays a loan originator a transaction-specific commission, the Dodd-Frank Act would ban the imposition on consumers of discount points, origination points, or other upfront origination fees that are retained by the creditor, broker, or an affiliate of either. Although bona fide upfront payments to independent appraisers or other third parties would still be permitted, the Act would require creditors in the vast majority of transactions in today's market to restructure their current pricing practices.

However, the Bureau is proposing to use its exception authority under the Dodd-Frank Act to allow creditors to continue making available loans with points and/or fees, so long as they also make available a comparable, alternative loan, as described below. The Bureau believes this approach would benefit consumers and industry alike. Making both options available would make it easier for consumers to evaluate different pricing options, while preserving their ability to make some upfront payments if they want to reduce their periodic payments over time. And the proposed approach would promote stability in the mortgage market, which would otherwise face radical restructuring of its existing pricing structures and practices to comply with the new Dodd-Frank Act requirement.

B. Restriction on Upfront Points and Fees

The proposed rule would generally require that, before a creditor or mortgage broker may impose upfront points and/or fees on a consumer in a closed-end mortgage transaction, the creditor must make available to the consumer a comparable, alternative loan with no upfront discount points, origination points, or origination fees that are retained by the creditor, broker, or an affiliate of either (a ''zero-zero alternative''). The requirement would not be triggered by charges that are passed on to independent third parties that are not affiliated with the creditor or mortgage broker. The requirement

[1] Public Law 111–203, 124 Stat. 1376.

would not apply where the consumer is unlikely to qualify for the zero-zero alternative.

In transactions that do not involve a mortgage broker, the proposed rule would provide a safe harbor if, any time prior to application that the creditor provides a consumer an individualized quote for a loan that includes upfront points and/or fees, the creditor also provides a quote for a zero-zero alternative. In transactions that involve mortgage brokers, the proposed rule would provide a safe harbor under which creditors provide mortgage brokers with the pricing for all of their zero-zero alternatives. Mortgage brokers then would provide quotes to consumers for the zero-zero alternatives when presenting different loan options to consumers.

The Bureau is seeking comment on a number of related issues, including:

- Whether the Bureau should adopt as proposed a ''bona fide'' requirement to ensure that consumers receive value in return for paying upfront points and/or fees and, if so, the relative merits of several alternatives on the details of such a requirement;
- Whether additional adjustments to the proposal concerning the treatment of affiliate fees would make it easier for consumers to compare offers between two or more creditors;
- Whether to take a different approach concerning situations in which a consumer does not qualify for the zero-zero alternative; and
- Whether to require information about zero-zero alternatives to be provided not just in connection with informal quotes, but also in advertising and at the time that consumers are provided disclosures within three days after application.

C. Restrictions on Loan Originator Compensation

The proposal would adjust existing rules governing compensation to loan officers and mortgage brokers in connection with closed-end mortgage transactions to account for the Dodd-Frank Act and to provide greater clarity and flexibility. Specifically, the proposal would:

- Continue the general ban on paying or receiving commissions or other loan originator compensation based on the terms of the transaction (other than loan amount), with some refinements:
  - The proposal would allow reductions in loan originator compensation to cover unanticipated increases in closing costs from non-affiliated third parties under certain circumstances.
  - The proposal would clarify when a factor used as a basis for compensation is prohibited as a ''proxy'' for a transaction term.
- Clarify and revise restrictions on pooled compensation, profit-sharing, and bonus plans for loan originators, depending on the potential incentives to steer consumers to different transaction terms.
  - The proposal would permit employers to make contributions from general profits derived from mortgage activity to 401(k) plans, employee stock plans, and other ''qualified plans'' under tax and employment law.
  - The proposal would permit employers to pay bonuses or make contributions to non-qualified profit-sharing or retirement plans from general profits derived from mortgage activity if either (1) the loan originator affected has originated five or fewer mortgage transactions during the last 12 months; or (2) the company's mortgage business revenues are limited. The Bureau is proposing two alternatives, 25 percent or 50 percent of total revenues, as the applicable test.
  - Even though contributions and bonuses could be funded from general mortgage profits, the amounts of such contributions and bonuses could not be based on the terms of the transactions that the individual had originated.
- Continue the general ban on loan originators being compensated by both consumers and other parties, with some refinements:
  - The proposal would allow mortgage brokerage firms that are paid by the consumer to pay their individual brokers a commission, so long as the commission is not based on the terms of the transaction.
  - The proposal would clarify that certain funds contributed toward closing costs by sellers, home builders, home-improvement contractors, or similar parties, when used to compensate a loan originator, are considered payments made directly to the loan originator by the consumer.

D. Loan Originator Qualification Requirements

The proposal would implement a Dodd-Frank Act provision requiring both individual loan originators and their employers to be ''qualified'' and to include their license or registration numbers on certain specified loan documents.

- Where a loan originator is not already required to be licensed under the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act), the proposal would require his or her employer to ensure that the loan originator meets character, fitness, and criminal background check standards that are equivalent to SAFE Act requirements and receives training commensurate with the loan originator's duties.
- Employers would be required to ensure that their loan originator employees are licensed or registered under the SAFE Act where applicable.
- Employers and the individual loan originators that are primarily responsible for a particular transaction would be required to list their license or registration numbers on certain key loan documents.

E. Other Provisions

The proposal would implement certain other Dodd-Frank Act requirements applicable to both closed-end and open-end mortgage credit:

- The proposal would ban general agreements requiring consumers to submit any disputes that may arise to mandatory arbitration rather than filing suit in court.
- The proposal would generally ban the financing of premiums for credit insurance.
- In the preamble below, the Bureau describes rule text that may be included in the final rule to implement a Dodd-Frank Act requirement that the Bureau require depository institutions to establish and maintain procedures to assure and monitor compliance with many of the requirements described above and the registration procedures established under the SAFE Act.

II. Background

A. The Mortgage Market

Overview of the Market and the Mortgage Crisis

The mortgage market is the single largest market for consumer financial products and services in the United States, with approximately $10.3 trillion in loans outstanding.[2] During the last decade, the market went through an unprecedented cycle of expansion and contraction. So many other parts of the American financial system were drawn into mortgage-related activities that, when the bubble collapsed in 2008, it sparked the most severe recession in the United States since the Great Depression.

The expansion in the market was driven, in part, by an era of low interest rates and rising house prices. Interest rates dropped significantly—by more than 20 percent—from 2000 through

[2] 2 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 7 (2012).

2003.[3] Housing prices increased dramatically—about 152 percent—between 1997 and 2006.[4] Driven by the decrease in interest rates and the increase in housing prices, the volume of refinancings was increasing, from about 2.5 million loans in 2000 to more than 15 million in 2003.[5]

Growth in the mortgage loan market was particularly pronounced in what are known as ''subprime'' and ''Alt-A'' products. Subprime products were sold primarily to borrowers with poor or no credit history, although there is evidence that some borrowers who would have qualified for ''prime'' loans were steered into subprime loans as well.[6] The Alt-A category of loans permitted borrowers to take out mortgage loans while providing little or no documentation of income or other evidence of repayment ability. Because these loans involved additional risk, they were typically more expensive to borrowers than ''prime'' mortgages, although many of them had very low introductory interest rates. In 2003, subprime and Alt-A origination volume was about $400 billion; in 2006, it had reached $830 billion.[7]

So long as housing prices were continuing to increase, it was relatively easy for borrowers to refinance their loans to avoid interest rate resets and other adjustments. When housing prices began to decline in 2005, refinancing became more difficult and delinquency rates on these subprime and Alt-A products increased dramatically.[8] The private securitization-backed subprime and Alt-A mortgage market ground to a halt in 2007 in the face of these rising delinquencies. Fannie Mae and Freddie Mac, which supported the mainstream mortgage market, experienced heavy losses and were placed in conservatorship by the Federal government in 2008.

Four years later, the United States continues to grapple with the fallout. Home prices are down 35 percent from the peak nationally, as the national market appears at or near its bottom.[9] Mortgage markets continue to rely on extraordinary U.S. government support, and distressed homeownership and foreclosure rates remain at unprecedented levels.[10]

Nevertheless, even with the economic downturn, approximately $1.28 trillion in mortgage loans were originated in 2011.[11] The overwhelming majority of homebuyers continue to use mortgage loans to finance at least some of the purchase price of their property. In 2011, 93 percent of all new home purchases were financed with a mortgage loan.[12] Purchase loans and refinancings together produced 6.3 million new first-lien mortgage loan originations in 2011.[13] Home equity loans and lines of credit resulted in an additional 1.3 million mortgage loan originations in 2011.[14]

The Mortgage Origination Process and Origination Channels

Consumers must go through a mortgage origination process to obtain a mortgage loan. There are many actors involved in a mortgage origination. In addition to the creditor and the consumer, a transaction may involve a mortgage broker, settlement agent, appraiser, multiple insurance providers, local government clerks and tax offices, and others. Purchase money loans involve additional parties such as sellers and real estate agents. These third parties typically charge fees or commissions for the services they provide.

Application. To obtain a mortgage loan, consumers must first apply through a loan originator. There are three different ''channels'' for mortgage loan origination in the current market:

- *Retail:* The consumer deals with a loan officer that works directly for the mortgage creditor, such as a bank, credit union, or specialized mortgage finance company. The creditor typically operates a network of branches, but may also communicate with consumers through mail and the Internet. The entire origination transaction is conducted within the corporate structure of the creditor, and the loan is closed using funds supplied by the creditor. Depending on the type of creditor, the creditor may hold the loan in its portfolio or sell the loan to investors on the secondary market, as discussed further below.
- *Wholesale:* The consumer deals with an independent mortgage broker, which may be an individual or a mortgage brokerage firm. The broker may seek offers from many different creditors, and then acts as a liaison between the consumer and whichever creditor ultimately makes the loan. At closing, the loan is funded using the creditor's funds and the mortgage note is written in the creditor's name.[15] Again, the creditor may hold the loan in its portfolio or sell the loan on the secondary market.
- *Correspondent:* The consumer deals with a loan officer that works directly for a ''correspondent lender'' that does not deal directly with the secondary market. At closing, the correspondent lender closes the loans using its own funds, but then immediately sells the loan to an ''acquiring creditor,'' which in turn either holds the loan in portfolio or sells it on the secondary market.

Both loan officers and mortgage brokers generally help consumers determine what kind of loan best suits their needs, and will take their

[3] *See* U.S. Dep't of Hous. & Urban Dev., *An Analysis of Mortgage Refinancing, 2001–2003,* at 2 (2004), available at: *www.huduser.org/Publications/pdf/MortgageRefinance03.pdf*; Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market,* 88 Fed. Res. Bank of St. Louis Rev. 31, 48 (2006), available at: *http://research.stlouisfed.org/publications/review/article/5019*.

[4] U.S. Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* 156 (Official Gov't ed. 2011) (''FCIC Report''), available at: *http://www.gpo.gov/fdsys/pkg/GPO–FCIC/pdf/GPO–FCIC.pdf*.

[5] An Analysis of Mortgage Refinancing, 2001–2003, at 1.

[6] The Federal Reserve Board on July 18, 2011 issued a consent cease and desist order and assessed an $85 million civil money penalty against Wells Fargo & Company of San Francisco, a registered bank holding company, and Wells Fargo Financial, Inc., of Des Moines. The order addresses allegations that Wells Fargo Financial employees steered potential prime borrowers into more costly subprime loans and separately falsified income information in mortgage applications. In addition to the civil money penalty, the order requires that Wells Fargo compensate affected borrowers. *See http://www.federalreserve.gov/newsevents/press/enforcement/20110720a.htm*.

[7] Inside Mortg. Fin., The 2011 Mortgage Market Statistical Annual (2011).

[8] FCIC Report at 215–217.

[9] *Standard & Poors/Case-Shiller 20-City Composite,* Bloomberg, LP, available at: *http://www.bloomberg.com* (data service accessible only through paid subscription).

[10] PowerPoint Presentation, Lender Processing Servs., *LPS Mortgage Monitor: May 2012 Mortgage Performance Observations, Data as of April 2012 Month End,* at 3, 11 (May 2012), available at: *http://www.lpsvcs.com/LPSCorporateInformation/CommunicationCenter/DataReports/Pages/Mortgage-Monitor.aspx*.

[11] *Credit Forecast 2012,* Moody's Analytics (2012), available at, *http://www.economy.com/default.asp* (reflects first-lien mortgage loans) (data service accessible only through paid subscription).

[12] 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 12 (2012).

[13] Credit Forecast 2012. The proportion of loans that are for purchases as opposed to refinancings varies with the interest rate environment. In 2011, refinance transactions comprised 65 percent of the market, and purchase money mortgage loans comprised 35 percent, by dollar volume. 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 17 (2012). Historically the distribution has been more even. In 2000, refinancings accounted for 44 percent of the market as measured by dollar volume, while purchase money mortgage loans comprised 56 percent, and in 2005 the two types of mortgage loan were split evenly. *Id.*

[14] Credit Forecast (2012). Using a home equity loan or line of credit, a homeowner uses home equity as collateral for a loan. The loan proceeds can be used, for example, to pay for home improvements or to pay off other debts.

[15] In some cases, mortgage brokers use a process called ''table funding,'' in which the wholesale creditor provides the funds to the settlement, but the loan is closed in the broker's name. The broker simultaneously assigns the closed loan to the creditor.

completed loan applications for submission to the creditor's loan underwriter. The application includes consumer credit and income information, along with information about the home to be purchased. Consumers can work with multiple loan originators to compare the loan offers that loan originators may obtain on their behalf from creditors. Once the consumer has decided to move forward with a loan, the loan originator may request additional information or documents from the consumer to support the information in the application and obtain an appraisal of the property.

Underwriting. The creditor's loan underwriter uses the application and additional information to confirm initial information provided by the consumer. The underwriter will assess whether the creditor should take on the risk of making the mortgage loan. To make this decision, the underwriter considers whether the consumer can repay the loan and whether the home is worth enough to serve as collateral for the loan. If the underwriter finds that the consumer and the home qualify, the underwriter will approve the consumer's mortgage application.

Closing. After being approved for a mortgage loan, completing any closing requirements, and receiving necessary disclosures, the consumer can close on the loan. Multiple parties participate at closing, including the consumer, the creditor, and the settlement agent.

Loan Pricing and Disposition of Closed Loans

Mortgage loan pricing is an extremely complex process that involves a series of trade-offs for both the consumer and the creditor between upfront and long-term payments. Some of the costs that borrowers pay to close the loan—such as third-party appraisal fees, title insurance, taxes, etc.—are independent of the other terms of the loan. But costs that are paid to the creditor, broker, or affiliates of either company often vary in connection with the interest rate because the consumer can choose whether to pay more money up front (through discount points, origination points, or origination fees) or over time (through the interest rate, which drives monthly payments). Borrowers face a complex set of decisions around whether to pay upfront charges to reduce the interest rate they would otherwise pay and, if so, how much to pay in such charges to receive a specific rate reduction.

Thus, from the consumer's perspective, loan pricing depends on several elements:

- *Loan terms.* The loan terms affect how the loan is to be repaid, including the type of loan ''product,'' [16] the interest rate, the payment amount, and the length of the loan term.
- *Discount points and cash rebates.* Discount points are paid by consumers to the creditor to purchase a lower interest rate. Conversely, creditors may offer consumers a cash rebate at closing which can help cover upfront closing costs in exchange for paying a higher rate over the life of the loan. Both discount points and creditor rebates involve an exchange of cash now (in the form of a payment or credit at closing) for cash over time (in the form of a reduced or increased interest rate).
- *Origination points or fees.* Creditors and/or loan originators also sometimes charge origination points or fees, which are typically presented as charges to apply for the loan. Origination fees can take a number of forms: A flat dollar amount, a percentage of the loan amount (*i.e.,* an ''origination point''), or a combination of the two. Origination points or fees may also be framed as a single lump sum or as several different fees (*e.g.,* application fee, underwriting fee, document preparation fee).
- *Closing costs.* Closing costs are the additional upfront costs of completing a mortgage transaction, including appraisal fees, title insurance, recording fees, taxes, and homeowner's insurance, for example. These closing costs, as distinct from upfront discount points and origination charges, often are paid to third parties other than the creditor or loan originator.

In practice, both discount points and origination points or fees are revenue to the lender and/or loan originator, and that revenue is fungible. The existence of two types of fees and the many names lenders use for origination fees—some of which may appear to be more negotiable than others—has the potential to confuse consumers.

Determining the appropriate trade-off between payments now and payments later requires a consumer to have a clear sense of how long he or she expects to stay in the home and in the particular loan. If the consumer plans to stay in the home for a number of years without refinancing, paying points to obtain a lower rate may make sense because the consumer will save more in monthly payments than he or she pays up front in discount points. If the consumer expects to move or refinance within a few years, however, then agreeing to pay a higher rate on the loan to reduce out of pocket expenses at closing may make sense because the consumer will save more up front than he or she will pay in increased monthly payments before moving or refinancing. There is a breakeven moment in time where the present value of a reduction/increase to the rate just equals the corresponding upfront points/credits. If the consumer moves or refinances earlier (in the case of discount points) or later (in the case of creditor rebates) than the breakeven moment, then the consumer will lose money compared to a consumer that neither paid discount points nor received creditor rebates.

The creditor's assessment of pricing—and in particular what different combinations of points, fees, and interest rates it is willing to offer particular consumers—is also driven by the trade-off between upfront and long-term payments. Creditors in general would prefer to receive as much money as possible up front, because having to wait for payments to come in over the life of the loan increases the level of risk. If consumers ultimately pay off a loan earlier than expected or cannot pay off a loan due to financial distress, the creditors will not earn the overall expected return on the loan.

One mechanism that has developed to manage this risk is the creation of the secondary market, which allows creditors to sell off their loans to investors, recoup the capital they have invested in the loans and recycle that capital into new loans. The investors then benefit from the payment streams over time, as well as bearing the risk of early payment or default. And the creditor can go on to make additional money from additional loans. Thus, although some banks and credit unions hold some loans in portfolio over time, many creditors prefer not to hold loans until maturity.[17]

When a creditor sells a loan into the secondary market, the creditor is exchanging an asset (the loan) that

[16] The meaning of loan ''product'' is not firmly established and varies with the person using the term, but it generally refers to various combinations of features such as the type of interest rate and the form of amortization. Feature distinctions often thought of as distinct ''loan products'' include, for example, fixed rate versus adjustable rate loans and fully amortizing versus interest-only or negatively amortizing loans.

[17] For companies that are affiliated with securitizers, the processing fees involved in creating investment vehicles on the secondary market can itself become a distinct revenue stream. Although the secondary market was originally created by government-sponsored enterprises Fannie Mae and Freddie Mac to provide liquidity for the mortgage market, over time, Wall Street companies began packaging mortgage loans into private-label mortgage-backed securities. Subprime and Alt-A loans, in particular, were often sold into private-label securities. During the boom, a number of large creditors started securitizing the loans themselves in-house, thereby capturing the final piece of the loan's value.

produces regular cash flows (principal and interest) for an upfront cash payment from the buyer.[18] That upfront cash payment represents the buyer's present valuation of the loan's future cash flows, using assumptions about the rate of prepayments due to moves and refinancings, the rate of expected defaults, the rate of return relative to other investments, and other factors. Secondary market buyers assume considerable risk in determining the price they are willing to pay for a loan. If, for example, loans prepay faster than expected or default at higher rates than expected, the investor will receive a lower return than expected. Conversely, if loans prepay more slowly than expected, or default at lower rates than expected, the investor will earn a higher return over time than expected.[19]

Secondary market mortgage prices are typically quoted as a multiple of the principal loan amount and are specific to a given interest rate. For illustrative purposes, at some point in time, a loan with an interest rate of 3.5 percent might earn 102.5 in the secondary market. This means that for every $100 in initial loan principal amount, the secondary market buyer will pay $102.50. Of that amount, $100 is to cover the principal amount and $2.50 is revenue to the creditor in exchange for the rights to the future interest payments on the loan.[20] The secondary market price of a loan increases or decreases along with the loan's interest rate, but the relationship is not typically linear. In other words, using the above example at the same point in time, loans with interest rates higher than 3.5 percent will typically earn more than 102.5, and loans with interest rates less than 3.5 percent will typically earn less than 102.5. However, each subsequent 0.125 percent increment in interest rate above or below 3.5 percent may not be associated with the same size increment in secondary market price.[21]

In some cases, secondary market prices can actually be less than the principal amount of the loan. A price of 98.75, for example, means that for every $100 in principal, the selling creditor receives only $98.75. This represents a loss of $1.25 per $100 of principal just on the sale of the loan, before the creditor takes its expenses into account. This usually happens when the interest rate on the loan is below prevailing interest rates. But so long as discount points or other origination charges can cover the shortfall, the creditor will still make its expected return on the loan. The same style of pricing is used when correspondent lenders sell loans to acquiring creditors.

Discount points are also valuable to creditors (and secondary market investors) for another reason: Because payment of discount points signals the consumer's expectations about how long he or she expects to stay in the loan, they make prepayment risk easier to predict. The more discount points a consumer pays, the longer the consumer likely expects to keep the loan in place. This fact mitigates a creditor's or investor's uncertainty about how long interest payments can be expected to continue, which facilitates assigning a present value to the loan's yield and, therefore, setting the loan's price.

Loan Originator Compensation

Prior to 2010, compensation for individual loan officers and mortgage brokers was also often calculated and paid as a premium above every $100 in principal. This was typically called a ''yield spread premium.'' The loan originator might keep the entire yield spread premium as a commission, or he or she might provide some of the yield spread premium to the borrower as a credit against closing costs.[22]

While this system was in place, it was common for loan originator commissions to mirror secondary market pricing closely. The ''price'' that the creditor quoted to its brokers and loan officers was somewhat lower than the price that the creditor expected to receive from the secondary market—the creditor kept the difference as corporate revenue. However, the underlying mechanics of the secondary market flowed through to the loan originator's compensation. The higher the interest rate on the loan or the more in upfront charges the consumer pays to the creditor (or both), the greater the yield spread premium available to the loan originator. This created a situation in which the loan originator had a financial incentive to steer consumers into the highest interest rate possible or to impose on the consumer additional upfront charges payable to the creditor.

In a perfectly competitive and transparent market, competition would ensure that this incentive would be countered by the need to compete with other loan originators to offer attractive loan terms to consumers. However, the mortgage origination market is neither always perfectly competitive nor always transparent, and consumers (who take out a mortgage only a few times in their lives) may be uninformed about how prices work and what terms they can expect.[23] Moreover, prior to 2010, mortgage brokers were free to charge consumers directly for additional origination points or fees, which were generally described as compensating for the time and expense of working with the consumer to submit the loan application. This compensation structure was problematic both because the loan originator had an incentive to steer borrowers into less favorable pricing terms and because the consumer may have paid origination fees to the loan originator believing that the loan originator was working for the borrower, without knowing that the loan originator was receiving compensation from the creditor as well.

The 2010 Loan Originator Final Rule

In the aftermath of the mortgage crisis, regulators and lawmakers began focusing on concerns about the steering of consumers into less favorable loan terms than those for which they otherwise qualified. Both the Board of Governors of the Federal Reserve System (Board) and the Department of Housing and Urban Development (HUD) had explored the use of disclosures to inform consumers about loan originator compensation practices. HUD did adopt a new disclosure regime under the Real Estate Settlement Procedures Act (RESPA), in a 2008 final rule, which addressed among other matters the

[18] For simplicity, this discussion assumes that the secondary market buyer is a person other than the creditor, such as Fannie Mae, Freddie Mac, or a Wall Street investment bank. In practice, during the mortgage boom, some creditors securitized their own loans. In this case, the secondary market price for the loans was effectively determined by the price investors were willing to pay for the subsequent securities.

[19] For simplicity, these examples do not take into account the use of various risk mitigation techniques, such as risk-sharing counterparties and loan level mortgage or other security credit enhancements.

[20] The creditor's profit is equal to secondary market revenue plus origination fees collected by the creditor (if any) plus value of the mortgage servicing rights (MSRs) less origination expenses.

[21] Susan E. Woodward, Urb. Inst., *A Study of Closing Costs for FHA Mortgages*10–11 (U.S. Dep't of Hous. & Urban Dev. 2008), available at: *http://www.huduser.org/publications/pdf/FHA_closing_cost.pdf.*

[22] Mortgage brokers, and some retail loan officers, were compensated in this fashion. Some retail loan officers may have been paid a salary with a bonus for loan volume, rather than yield spread premium-based commissions.

[23] James Lacko and Janis Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms,* Federal Trade Commission, p. 26 (June 2007), available at: *http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf,* Brian K. Bucks and Karen M. Pence, *Do Borrowers Know their Mortgage Terms?,* J. of Urban Econ. (2008), available at: *http://works.bepress.com/karen_pence/5*, Hall and Woodward, *Diagnosing Consumer Confusion and Sub-Optimal Shopping Effort: Theory and Mortgage-Market Evidence* (2012), available at: *http://www.stanford.edu/~rehall/DiagnosingConsumerConfusionJune2012.*

disclosure of mortgage broker compensation.[24] The Board, on the other hand, first proposed a disclosure-based approach to addressing concerns with mortgage broker compensation.[25] The Board later determined, however, that the proposed approach presented a significant risk of misleading consumers regarding both the relative costs of brokers and creditors and the role of brokers in their transactions and, consequently, withdrew that aspect of the 2008 proposal as part of its 2008 Home Ownership and Equity Protection Act (HOEPA) Final Rule.[26]

The Board in 2009 proposed new rules addressing in a more substantive fashion loan originator compensation practices.[27] Although this proposal was prior to the enactment of the Dodd-Frank Act, Congress subsequently codified significant elements of the Board's proposal.[28] Specifically, the Board's new proposal prohibited the payment and receipt of loan originator compensation based on transaction terms or conditions, and banned the receipt by a loan originator of compensation on a particular transaction from both the consumer and any other person; the Dodd-Frank Act substantially paralleled both of these provisions. The Board therefore decided in 2010 to finalize those rules, while acknowledging that some adjustments would need to be made to account for the statutory language.[29] The Board's 2010 Loan Originator Final Rule took effect in April of 2011.

Most notably, the Board's 2010 Loan Originator Final Rule substantially restricted the use of yield spread premiums. Under the current regulations, creditors may not base a loan originator's compensation on the transaction's terms or conditions, other than the mortgage loan amount. In addition, the rule prohibits ''dual compensation,'' in which a loan originator is paid compensation by both the consumer and the creditor (or any other person).[30] The existing rules, however, do not address broader consumer confusion regarding the relationship between loan originator compensation and general trade-offs between points, fees, and interest rates.

B. TILA and Regulation Z

Congress enacted the Truth in Lending Act (TILA) based on findings that the informed use of credit resulting from consumers' awareness of the cost of credit would enhance economic stability and would strengthen competition among consumer credit providers. 15 U.S.C. 1601(a). One of the purposes of TILA is to provide meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit. *Id.* TILA's disclosures differ depending on whether credit is an open-end (revolving) plan or a closed-end (installment) loan. TILA also contains procedural and substantive protections for consumers. TILA is implemented by the Bureau's Regulation Z, 12 CFR part 1026, though historically the Board's Regulation Z, 12 CFR part 226, has implemented TILA.[31]

On August 26, 2009, as discussed above, the Board published proposed amendments to Regulation Z to include new limits on loan originator compensation for all closed-end mortgages (Board's 2009 Loan Originator Proposal). 74 FR 43232 (Aug. 26, 2009). The Board considered, among other changes, prohibiting certain payments to a mortgage broker or loan officer based on the transaction's terms or conditions, prohibiting dual compensation as described above, and prohibiting a mortgage broker or loan officer from ''steering'' consumers to transactions not in their interest, to increase mortgage broker or loan officer compensation. The Board issued the 2009 Loan Originator Proposal using its authority to prohibit acts or practices in the mortgage market that the Board found to be unfair, deceptive, or (in the case of refinancings) abusive under TILA section 129(*l*)(2) (now re-designated as TILA section 129(p)(2), 15 U.S.C. 1639(p)(2)).

On September 24, 2010, the Board issued the 2010 Loan Originator Final Rule, which finalized the 2009 Loan Originator Proposal and included the above prohibitions. 75 FR 58509 (Sept. 24, 2010). The Board acknowledged, however, that further rulemaking would be required to address certain issues and adjustments made by the Dodd-Frank Act, which was signed on July 21, 2010.[32] Public Law 111–203, 124 Stat. 1376.

C. The SAFE Act

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) generally prohibits an individual from engaging in the business of a loan originator without first obtaining, and maintaining annually, a unique identifier from the Nationwide Mortgage Licensing System and Registry (NMLSR) and either a registration as a registered loan originator or a license and registration as a State-licensed loan originator. 12 U.S.C. 5103. Loan originators who are employees of depository institutions are generally subject to the registration requirement, which is implemented by the Bureau's Regulation G, 12 CFR part 1007. Other loan originators are generally subject to the State licensing requirement, which is implemented by the Bureau's Regulation H, 12 CFR part 1008, and by State law.

D. The Dodd-Frank Act

Effective July 21, 2011, the Dodd-Frank Act transferred rulemaking authority for TILA and the SAFE Act, among other laws, to the Bureau.[33] *See* sections 1061 and 1100A of the Dodd-Frank Act. In addition, the Dodd-Frank Act added section 129B to TILA, which

[24] 73 FR 68204, 68222–27 (Nov. 17, 2008).

[25] *See* 73 FR 1672, 1698–1700 (Jan. 9, 2008).

[26] 73 FR 44522, 44564 (Jul. 30, 2008). The Board indicated that it would continue to explore available options to address potential unfairness associated with loan originator compensation practices. *Id.* at 44565.

[27] 74 FR 43232, 43279–286 (Aug. 26, 2009).

[28] Sections 1402 and 1403 of the Dodd-Frank Act, codified at 15 U.S.C. 1639b.

[29] 75 FR 58509 (Sept. 24, 2010) (2010 Loan Originator Final Rule).

[30] *See generally* 12 CFR 226.36(d). The CFPB restated this rule at 12 CFR 1026.36(d). 76 FR 79768 (Dec. 22, 2011).

[31] The Board's rule remains applicable to certain motor vehicle dealers. *See* section 1029 of the Dodd-Frank, 12 U.S.C. 5519.

[32] As the Board explained: ''The Board has decided to issue this final rule on loan originator compensation and steering, even though a subsequent rulemaking will be necessary to implement Section 129B(c). The Board believes that Congress was aware of the Board's proposal and that in enacting TILA Section 129B(c), Congress sought to codify the Board's proposed prohibitions while expanding them in some respects and making other adjustments. The Board further believes that it can best effectuate the legislative purpose of the [Dodd-Frank Act] by finalizing its proposal relating to loan origination compensation and steering at this time. Allowing enactment of TILA Section 129B(c) to delay final action on the Board's prior regulatory proposal would have the opposite effect intended by the legislation by allowing the continuation of the practices that Congress sought to prohibit.'' 75 FR 58509 (Sept. 24, 2010).

[33] Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 12 CFR part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). 76 FR 79768 (Dec. 22, 2011). Similarly, the Bureau's Regulations G and H are recodifications of predecessor agencies' regulations implementing the SAFE Act. 76 FR 78483 (Dec. 19, 2011). The Bureau's Regulations G, H, and Z took effect on December 30, 2011. These rules did not impose any new substantive obligations but did make certain technical, conforming, and stylistic changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act.

imposes two new duties on mortgage originators. The first such duty is to be ''qualified'' and (where applicable) registered and licensed in accordance with the SAFE Act and other applicable State or Federal law. The second new duty of mortgage originators is to include on all loan documents the originator's identifier number from the NMLSR. *See* section 1402 of the Dodd-Frank Act.

In addition, the Dodd-Frank Act generally codified, but in some cases imposed new or different requirements than, the Board's 2009 Loan Originator Proposal. Shortly after the legislation, the Board adopted the 2010 Loan Originator Final Rule, which prohibits loan originator compensation based on transactions' terms or conditions and compensation from both the consumer and another person, as discussed above. Those regulatory provisions were consistent with some aspects of the Dodd-Frank Act. In addition, the Dodd-Frank Act generally prohibits any person from requiring consumers to pay any upfront discount points, origination points, or fees, however denominated, where a mortgage originator is being paid transaction-specific compensation by any person other than the consumer (subject to the Bureau's express authority to make an exemption from the prohibition of such upfront charges if the Bureau finds such an exemption to be in the interest of consumers and the public). *See* section 1403 of the Dodd-Frank Act. Finally, the Dodd-Frank Act also added new restrictions on the financing of single-premium credit insurance and mandatory arbitration agreements. *See* section 1414 of the Dodd-Frank Act.

E. Other Rulemakings

In addition to this proposal, the Bureau currently is engaged in six other rulemakings relating to mortgage credit to implement requirements of the Dodd-Frank Act:

- *TILA–RESPA Integration:* On July 9, 2012, the Bureau published a proposed rule and proposed integrated forms combining the TILA mortgage loan disclosures with the Good Faith Estimate (GFE) and settlement statement required under the Real Estate Settlement Procedures Act (RESPA), pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively. 12 U.S.C. 2603(a); 15 U.S.C. 1604(b). The public has until November 6, 2012 to review and provide comments on most of this proposal, except that comments are due by September 7, 2012 for specific portions of the proposal.
- *HOEPA:* The Bureau proposed on July 9, 2012 to implement Dodd-Frank Act requirements expanding protections for ''high-cost'' mortgage loans under the Home Ownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The public has until September 7, 2012 to review and provide comment on this proposal, except comments on the Paperwork Reduction Act.
- *Servicing:* The Bureau proposed on August 9, 2012 to implement Dodd-Frank Act requirements regarding force-placed insurance, error resolution, and payment crediting, as well as forms for mortgage loan periodic statements and ''hybrid'' adjustable-rate mortgage reset disclosures, pursuant to sections 6 of RESPA and 128, 128A, 129F, and 129G of TILA, as amended or established by Dodd-Frank Act sections 1418, 1420, 1463, and 1464. 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g. The Bureau also proposed rules on reasonable information management, early intervention for delinquent consumers, continuity of contact, and loss mitigation, pursuant to the Bureau's authority to carry out the consumer protection purposes of RESPA in section 6 of RESPA, as amended by Dodd-Frank Act section 1463. 12 U.S.C. 2605. The public has until October 9, 2012 to review and provide comment on these proposals, except comments on the Paperwork Reduction Act.
- *Appraisals:* The Bureau, jointly with Federal prudential regulators and other Federal agencies, on August 15, 2012 issued a proposal to implement Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, appraisal management companies, and automated valuation models, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471, 15 U.S.C. 1639h, and sections 1124 and 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) as established by Dodd-Frank Act sections 1473(f), 12 U.S.C. 3353, and 1473(q), 12 U.S.C. 3354, respectively. In addition, the Bureau on the same date issued rules to implement section 701(e) of the Equal Credit Opportunity Act (ECOA), as amended by Dodd-Frank Act section 1474, to require that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling. 15 U.S.C. 1691(e).
- *Ability to Repay:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring creditors to determine that a consumer can repay a mortgage loan and establishing standards for compliance, such as by making a ''qualified mortgage,'' pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411 and 1412. 15 U.S.C. 1639c.
- *Escrows:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring certain escrow account disclosures and exempting from the higher-priced mortgage loan escrow requirement loans made by certain small creditors, among other provisions, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461 and 1462. 15 U.S.C. 1639d.

With the exception of the TILA–RESPA Integration Proposal, the Dodd-Frank Act requirements will take effect on January 21, 2013 unless final rules implementing those requirements are issued on or before that date and provide for a different effective date.

The Bureau regards the foregoing rulemakings as components of a single, comprehensive undertaking; each of them affects aspects of the mortgage industry and its regulation that intersect with one or more of the others. Accordingly, the Bureau is coordinating carefully the development of the proposals and final rules identified above. Each rulemaking will adopt new regulatory provisions to implement the various Dodd-Frank Act mandates described above. In addition, each of them may include other provisions the Bureau considers necessary or appropriate to ensure that the overall undertaking is accomplished efficiently and that it ultimately yields a comprehensive regulatory scheme for mortgage credit that achieves the statutory purposes set forth by Congress, while avoiding unnecessary burdens on industry.

Thus, the Bureau intends that the rulemakings listed above function collectively as a whole. In this context, each rulemaking may raise concerns that might appear unaddressed if that rulemaking were viewed in isolation. The Bureau intends, however, to address issues raised by its mortgage rulemakings through whichever rulemaking is most appropriate, in the Bureau's judgment, for addressing each specific issue. In some cases, the Bureau expects that one rulemaking may raise an issue and yet may not be the rulemaking that is most appropriate for

addressing that issue. For example, the proposed requirement to include NMLS IDs on loan documents, discussed in Part V under § 1026.36(g), below, also is proposed to be addressed in part by the TILA–RESPA Integration Proposal.

III. Outreach Conducted for This Rulemaking

A. Early Stakeholder Outreach & Feedback on Existing Rules

The Bureau conducted extensive outreach in developing the provisions in this proposed rule. Bureau staff met with and held in-depth conference calls with large and small bank and non-bank mortgage creditors, mortgage brokers, trade associations, secondary market participants, consumer groups, non-profit organizations, and State regulators. Discussions covered existing business models and compensation practices and the impact of the existing Loan Originator Rule. They also covered the Dodd-Frank Act provisions and the impact on consumers, loan originators, lenders, and secondary market participants of various options for implementing the statutory provisions. The Bureau developed several of the proposed clarifications of existing regulatory requirements in response to compliance inquiries and with input from industry participants.

B. Small Business Review Panel

In May 2012, the Bureau convened a Small Business Review Panel with the Chief Counsel for Advocacy of the Small Business Administration (SBA) and the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).[34] As part of this process, the Bureau prepared an outline of the proposals then under consideration and the alternatives considered (Small Business Review Panel Outline), which the Bureau posted on its Web site for review by the general public as well as the small entities participating in the panel process.[35] The Small Business Review Panel gathered information from representatives of small creditors, mortgage brokers, and not-for-profit organizations and made findings and recommendations regarding the potential compliance costs and other impacts of the proposed rule on those entities. These findings and recommendations are set forth in the Small Business Review Panel Report, which will be made part of the administrative record in this rulemaking.[36] The Bureau has carefully considered these findings and recommendations in preparing this proposal and has addressed certain specific ones below.

In addition, the Bureau held roundtable meetings with other Federal banking and housing regulators, consumer advocacy groups, and industry representatives regarding the Small Business Review Panel Outline. At the Bureau's request, many of the participants provided feedback, which the Bureau has considered in preparing this proposal.

IV. Legal Authority

The Bureau is issuing this proposed rule pursuant to its authority under TILA and the Dodd-Frank Act. On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' 12 U.S.C. 5581(a)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA). Accordingly, the Bureau has authority to issue regulations pursuant to TILA, as well as title X of the Dodd-Frank Act.

A. The Truth in Lending Act

TILA Section 105(a)

As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The purpose of TILA is ''to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' TILA section 102(a); 15 U.S.C. 1601(a). These stated purposes are tied to Congress's finding that ''economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.'' TILA section 102(a). Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes. In addition, TILA section 129B(a)(2) establishes a purpose of TILA sections 129B and 129C to ''assure consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive.'' 15 U.S.C. 1639b(a)(2).

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. However, Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). The Dodd-Frank Act also clarified the Bureau's rulemaking authority over certain high-cost mortgages pursuant to section 105(a). As

[34] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a substantial economic impact on a significant number of small entities. *See* Public Law 104–121, tit. II, 110 Stat. 847, 857 (1996) (as amended by Pub. L. 110–28, section 8302 (2007)).

[35] U.S. Consumer Fin. Prot. Bureau, *Outline of Proposals under Consideration and Alternatives Considered* (May 9, 2012), available at: *http://files.consumerfinance.gov/f/201205_cfpb_MLO_SBREFA_Outline_of_Proposals.pdf* .

[36] U.S. Consumer Fin. Prot. Bureau, U.S. Small Bus. Admin., and U.S. Office of Mgmt. and Budget, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Residential Mortgage Loan Origination Standards Rulemaking* (July 11, 2012) (Small Business Review Panel Final Report), available at: *http://files.consumerfinance.gov/f/201208_cfpb_LO_comp_SBREFA.pdf.*

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amended by the Dodd-Frank Act, the Bureau's TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the substantive protections of TILA section 129, 15 U.S.C. 1639,[37] which apply to the high-cost mortgages referred to in TILA section 103(bb), 15 U.S.C. 1602(bb).

For the reasons discussed in this notice, the Bureau is proposing regulations to carry out TILA's purposes and is proposing such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of the proposal pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, and helping consumers avoid the uninformed use of credit, as well as ensuring consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deception or abusive. In developing this proposal and using its authority under TILA section 105(a), the Bureau also has considered the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

TILA Section 129B(c)

Dodd-Frank Act section 1403 amended TILA section 129B by imposing two limitations on loan originator compensation to reduce or eliminate steering incentives for residential mortgage loans.[38] 15 U.S.C. 1639b(c). First, it generally prohibits loan originators from receiving compensation for any residential mortgage loan that varies based on the terms of the loan, other than the amount of the principal. Second, TILA section 129B generally allows only consumers to compensate loan originators, though an exception permits other persons to pay ''an origination fee or charge'' to a loan originator, but only if two conditions are met: (1) The loan originator does not receive any compensation directly from a consumer; and (2) the consumer does not make an upfront payment of discount points, origination points, or fees (other than bona fide third party fees that are not retained by the creditor, the loan originator, or the affiliates of either). The Bureau has authority to prescribe regulations to prohibit the above practices. In addition, TILA section 129B(c)(2)(B)(ii) authorizes the Bureau to create exemptions from the exception's second prerequisite, that the consumer must not make any upfront payments of points or fees, where the Bureau determines that doing so ''is in the interest of consumers and in the public interest.''

TILA Section 129(p)(2)

HOEPA amended TILA by adding, in new section 129, a broad mandate to prohibit certain acts and practices in the mortgage industry. In particular, TILA section 129(p)(2), as re-designated by Dodd-Frank Act section 1433(a), requires the Bureau to prohibit, by regulation or order, acts or practices in connection with mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of HOEPA. 15 U.S.C. 1639(p)(2). Likewise, TILA requires the Bureau to prohibit, by regulation or order, acts or practices in connection with the refinancing of mortgage loans that the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the consumer. *Id.*

The authority granted to the Bureau under TILA section 129(p)(2) is broad. It reaches mortgage loans with rates and fees that do not meet HOEPA's rate or fee trigger in TILA section 103(bb), 15 U.S.C. 1602(bb), as well as mortgage loans not covered under that section. TILA section 129(p)(2) is not limited to acts or practices by creditors, or to loan terms or lending practices.

TILA Section 129B(e)

Dodd-Frank Act section 1405(a) amended TILA to add new section 129B(e), 15 U.S.C. 1639b(e). That section provides for the Bureau to prohibit or condition terms, acts, or practices relating to residential mortgage loans on a variety of bases, including when the Bureau finds the terms, acts, or practices are not in the interest of the consumer. In developing proposed rules under TILA section 129B(e), the Bureau has considered all of the bases for its authority set forth in that section.

TILA Section 129C(d)

Dodd-Frank Act section 1414(d) amended TILA to add new section 129C(d), 15 U.S.C. 1639c(d). That section prohibits the financing of certain single-premium credit insurance products. As discussed more fully in the section-by-section analysis below, the Bureau is proposing to implement this prohibition in new § 1026.36(i).

TILA Section 129C(e)

Dodd-Frank Act section 1414(e) amended TILA to add new section 129C(e), 15 U.S.C. 1639c(e). That section restricts mandatory arbitration agreements in residential mortgage loan transactions. As discussed more fully in the section-by-section analysis below, the Bureau is proposing to implement these restrictions in new § 1026.36(h).

B. The Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under section 1022(b)(1). 12 U.S.C. 5512(b)(2). As discussed above, TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau proposes to exercise its authority under Dodd-Frank Act section 1022(b) to prescribe rules under TILA that carry out the purposes and prevent evasion of TILA. *See* part VI for a discussion of the Bureau's analysis and consultation pursuant to the standards for rulemaking under Dodd-Frank Act section 1022(b)(2).

V. Section-by-Section Analysis

This proposal implements new TILA sections 129B(b)(1), (c)(1), and (c)(2) and 129C(d) and (e), as added by sections 1402, 1403, 1414(d) and (e) of the Dodd-Frank Act.[39] As discussed in more detail in the section-by-section analysis to proposed § 1026.36(f) and (g), TILA

[37] TILA section 129 contains requirements for certain high-cost mortgages, established by the Home Ownership and Equity Protection Act (HOEPA), which are commonly called HOEPA loans.

[38] Section 1403 of the Dodd-Frank Act also added new TILA section 129B(c)(3), which requires the Bureau to prescribe regulations to prohibit certain kinds of steering, abusive or unfair lending practices, mischaracterization of credit histories or appraisals, and discouraging consumers from shopping with other mortgage originators. 15 U.S.C. 1639b(c)(3). This proposed rule does not address those provisions. Because they are structured as a requirement that the Bureau prescribe regulations establishing the substantive prohibitions, notwithstanding Dodd-Frank Act section 1400(c)(3), 15 U.S.C. 1601 note, the Bureau believes that the substantive prohibitions cannot take effect until the regulations establishing them have been prescribed and taken effect. The Bureau intends to prescribe such regulations in a future rulemaking. Until such time, no obligations are imposed on mortgage originators or other persons under TILA section 129B(c)(3).

[39] As discussed in Part VI.B, below, the final rule under this proposal also may implement new TILA section 129B(b)(2).

section 129B(b)(1) requires each mortgage originator to be qualified and include unique identification numbers on loan documents. As discussed in more detail in the section-by-section analysis to proposed § 1026.36(d)(1) and (2), TILA section 129B(c)(1) and (2) prohibits ''mortgage originators'' in ''residential mortgage loans'' from receiving compensation that varies based on loan terms and from receiving origination charges or fees from persons other than the consumer except in certain circumstances. Additionally, as discussed in more detail in the section-by-section analysis to proposed § 1026.36(i), TILA section 129C(d) creates prohibitions on single-premium credit insurance. Finally, as discussed in the section-by-section analysis to proposed § 1026.36(h), TILA section 129C(e) provides restrictions on mandatory arbitration agreements.

Section 1026.25 Record Retention

Current § 1026.25 requires creditors to retain evidence of compliance with Regulation Z. The Bureau proposes to add § 1026.25(c)(2) and (3) to establish record retention requirements for compliance with § 1026.36(d). Proposed § 1026.25(c)(2): (1) Extends the time period for retention by creditors of compensation-related records from two years to three years; (2) requires loan originator organizations (*i.e.,* generally, mortgage broker companies) to maintain certain compensation-related records for three years; and (3) clarifies the types of compensation-related records that are required to be maintained under the rule. Proposed § 1026.25(c)(3) requires creditors to maintain records evidencing compliance with the requirements related to discount points and origination points or fees set forth in proposed § 1026.36(d)(2)(ii); it also extends the two-year requirement to three years.

25(a) General Rule

Current comment 25(a)–5 clarifies the nature of the record retention requirements under § 1026.25 as applied to Regulation Z's loan originator compensation provisions. The comment provides that for each transaction subject to the loan originator compensation provisions in § 1026.36(d)(1), a creditor should maintain records of the compensation it provided to the loan originator for the transaction as well as the compensation agreement in effect on the date the interest rate was set for the transaction. The comment also states that where a loan originator is a mortgage broker, a disclosure of compensation or other broker agreement required by applicable State law that complies with § 1026.25 would be presumed to be a record of the amount actually paid to the loan originator in connection with the transaction.

The Bureau is proposing new § 1026.25(c)(2), which sets forth certain new record retention requirements for loan originators as discussed below. New comments 25(c)(2)–1 and –2 are being proposed to accompany proposed § 1026.25(c)(2), and those comments incorporate substantially the same guidance as existing comment 25(a)–5. Therefore, the Bureau proposes to delete existing comment 25(a)–5.

25(c) Records Related to Certain Requirements for Mortgage Loans

25(c)(2) Records Related to Requirements for Loan Originator Compensation Retention of Records for Three Years

TILA does not contain requirements to retain specific records, but § 1026.25 requires creditors to retain evidence of compliance with TILA for two years after the date disclosures are required to be made or action is required to be taken. Section 1404 of the Dodd-Frank Act amended TILA section 129B to provide a cause of action against any mortgage originator for failure to comply with the requirements of TILA section 129B and any of its implementing regulations. 15 U.S.C. 1639b(d). Section 1416(b) of the Dodd-Frank Act amended section 130(e) of TILA to extend the statute of limitations for a civil action alleging a violation of TILA section 129B (along with sections 129 and 129C) to three years beginning on the date of the occurrence of the violation.[40] 15 U.S.C. 1639b(d), 1640(e). In view of the statutory changes to TILA, the provisions of current § 1026.25, which require a two-year record retention period, do not reflect all applicable statutes of limitations for causes of action brought under TILA. Moreover, the record retention provisions in § 1026.25 currently are limited to creditors, whereas TILA section 129B(e), as added by the Dodd-Frank Act, covers all loan originators and not solely creditors.

Consequently, the Bureau proposes § 1026.25(c)(2), which makes two changes to the current record retention provisions. First, a creditor must maintain records sufficient to evidence the compensation it pays to a loan originator organization or the creditor's individual loan originators, and the governing compensation agreement, for three years after the date of payment. Second, a loan originator organization must maintain for three years records of the compensation (1) it receives from a creditor, a consumer, or another person, and (2) it pays to its individual loan originators. The loan originator organization must maintain records sufficient to evidence the compensation agreement that governs those receipts or payments, for three years after the date of the receipts or payments. The Bureau proposes these changes pursuant to its authority under section 105(a) of TILA to prevent circumvention or evasion of TILA by requiring records that can be used to establish compliance. The Bureau believes these proposed modifications will ensure records associated with loan originator compensation are retained for a time period commensurate with the statute of limitations for causes of action under TILA section 130 and are readily available for examination, which is necessary to prevent circumvention of and to facilitate compliance with TILA.

However, the Bureau invites public comment on whether a record retention period of five years, rather than three years, would be appropriate. The Bureau believes that relevant actions and compensation practices that must be evidenced in retained records may in some cases occur prior to the beginning of the three-year period of enforceability that applies to a particular transaction. In addition, the running of the three-year period may be tolled (*i.e.,* paused) under some circumstances, resulting in a period of enforceability that ends more than three years following an occurrence of a violation of applicable requirements. Accordingly, a record retention period that is longer than three years may help ensure that consumers are able to avail themselves of TILA protections while imposing minimal incremental burden on creditors and loan originators. The Bureau notes that many State and local laws related to transactions involving real property may require a record retention period, or may depend on the information being available, for five years. Additionally, a five-year record retention period is consistent with provisions in the Bureau's TILA–RESPA Integration Proposal.

The Bureau believes that it is necessary to extend the record retention requirements to loan originator organizations, thus requiring both creditors and loan originator organizations to retain evidence of compliance with the requirements of

[40] Prior to the Dodd-Frank Act amendment, TILA section 130(e) provided for a one year statute of limitations for civil actions to enforce TILA provisions. A civil action to enforce certain TILA provisions (including section 129B) brought by a State attorney general has a three year statute of limitations.

§ 1026.36(d)(1) for three years. Although creditors may retain some of the records needed to demonstrate compliance with TILA section 129B and its implementing regulations, in some circumstances, the records may be available solely from the loan originator organization. For example, if a creditor pays a loan originator organization a fee for arranging a loan and the loan originator organization in turn allocates a portion of that fee to the individual loan originator as a commission, the creditor may not possess a copy of the commission agreement setting forth the arrangement between the loan originator organization and the individual loan originator or any record of the payment of the commission. The Bureau believes that applying this proposed requirement to both creditors and loan originator organizations will prevent circumvention of and facilitate compliance with TILA, as amended by the Dodd-Frank Act.

The Bureau recognizes that extending the record retention requirement for creditors from two years for specific information related to loan originator compensation, as currently provided in Regulation Z, to three years may result in some increase in costs for creditors. The Bureau believes, however, that creditors should be able to use existing recordkeeping systems to maintain the records for an additional year at minimal cost. Similarly, although loan originator organizations may incur some costs to establish and maintain recordkeeping systems, loan originator organizations may be able to use existing recordkeeping systems that they maintain for other purposes at minimal cost. During the Small Business Review Panel process, the small entity representatives were asked about their current record retention practices and the potential impact of the proposed enhanced record retention requirements. Of the few small entity representatives who gave feedback on the issue, one creditor small entity representative stated that it maintained detailed records of compensation paid to all of its employees and that a regulator already reviews its compensation plans regularly, and another creditor small entity representative reported that it did not believe the proposed record retention requirement would require it to change its current practices.

Applying the current two-year record retention period to information specified in proposed § 1026.25(c) could adversely affect the ability of consumers to bring actions under TILA. The extension also would serve to reduce litigation risk and maintain consistency between creditors and loan originator organizations. The Bureau therefore believes it is appropriate to expand the time period for record retention to effectuate the three-year statute of limitations period established by Congress for actions against loan originators under section 129B of TILA.

Exclusion of Individual Loan Originators

The proposed recordkeeping requirements do not apply to individual loan originators. Although section 129B(d) of TILA, as amended by the Dodd-Frank Act, permits consumers to bring actions against mortgage originators (which include individual loan originators), the Bureau believes that applying the proposed record retention requirements of § 1026.25 to individual loan originators is unnecessary. Under the proposed record retention requirements, loan originator organizations and creditors must retain certain records regarding all of their individual loan originator employees. Applying the same record retention requirements to the individual loan originator employees themselves would be duplicative. In addition, such a requirement may not be feasible in all cases, because individual loan originators may not have access to the types of records required to be retained under § 1026.25, particularly after they cease to be employed by the creditor or loan originator organization. An individual loan originator who is a sole proprietor, however, is responsible for compliance with provisions that apply to the proprietorship (which is a loan originator organization) and, as a result, is responsible for compliance with the proposed record retention requirements. Similarly, an individual who is a creditor is subject to the requirements that apply to creditors.

Substance of Record Retention Requirements

As discussed above, proposed § 1026.25(c)(2) makes two changes to the current record retention provisions. First, proposed § 1026.25(c)(2)(i) requires a creditor to maintain records sufficient to evidence all compensation it pays to a loan originator organization or the creditor's individual loan originators, and a copy of the governing compensation agreement. Second, proposed § 1026.25(c)(2)(ii) requires a loan originator organization to maintain records of all compensation that it receives from a creditor, a consumer, or another person or that it pays to its individual loan originators; it also requires the loan originator organization to maintain a copy of the compensation agreement that governs those receipts or payments.

Proposed comment 25(c)(2)–1.i clarifies that, under proposed § 1026.25(c)(2), records are sufficient to evidence that compensation was paid and received if they demonstrate facts enumerated in the comment. The comment gives examples of the types of records that, depending on the facts and circumstances, may be sufficient to evidence compliance. Proposed comment 25(c)(2)–1.ii clarifies that the compensation agreement, evidence of which must to be retained under 1026.25(c)(2), is any agreement, written or oral, or course of conduct that establishes a compensation arrangement between the parties. Proposed comment 25(c)(2)–1.iii provides an example where the expiration of the three-year retention period varies depending on when multiple payments of compensation are made. Proposed comment 25(c)(2)–2 provides an example of retention of records sufficient to evidence payment of compensation.

25(c)(3) Records Related to Requirements for Discount Points and Origination Points or Fees

Proposed § 1026.25(c)(3) requires creditors to retain records pertaining to compliance with the provisions of § 1026.36(d)(2)(ii), regarding the payment of discount points and origination points or fees (see the section-by-section analysis to proposed § 1026.36(d)(2)(ii), below, for further discussion of these proposed requirements). Specifically, it provides that, for each transaction subject to proposed § 1026.36(d)(2)(ii), the creditor must maintain records sufficient to evidence that the creditor has made available to the consumer the comparable, alternative loan that does not include discount points and origination points or fees as required by § 1026.36(d)(2)(ii)(A) or if such a loan was not made available to the consumer, a good-faith determination that the consumer was unlikely to qualify for such a loan. The creditor must also maintain records to evidence compliance with the ''bona fide'' requirements under proposed § 1026.36(d)(2)(ii)(C) (*e.g.,* that the payment of discount points and origination points or fees leads to a bona fide reduction in the interest rate). For the same reasons discussed above under § 1026.25(c)(2), the Bureau also proposes that creditors be required to retain records under § 1026.25(c)(3) for three years and also invites comment on whether the period of required record

retention for purposes of § 1026.25(c)(3) should be five years.

Section 36 Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(a) Loan Originator, Mortgage Broker, and Compensation Defined

As discussed above, this proposed rule would implement new TILA sections 129B(b)(1), (c)(1) and (c)(2) and 129C(d) and (e), as added by sections 1402, 1403, and 1414(d) and (e) of the Dodd-Frank Act. TILA section 103(cc), which was added by section 1401 of the Dodd-Frank Act, contains definitions for ''mortgage originator'' and ''residential mortgage loan.'' These definitions are relevant to the implementation of loan originator compensation restrictions, limitations on discount points and origination points or fees, and loan originator qualification provisions under this proposal. The statutory definitions largely parallel the existing regulation's coverage, in terms of both persons and transactions subject to its requirements. As discussed below, the Bureau is seeking to retain the existing regulatory terms, to maximize continuity, while adjusting as necessary to reflect statutory differences, to reflect the fact that they now relate to more than just loan originator compensation limitations, and to facilitate the additional interpretation and clarification being proposed under existing rules.

Current § 1026.36 uses the term ''loan originator.'' Dodd-Frank Act amendments to TILA being addressed in this proposed rulemaking use the term ''mortgage originator'' as defined in TILA section 103(cc)(2). The Bureau does not propose to change the existing terminology in § 1026.36, although the Bureau is proposing certain clarifying amendments to the definition and its commentary. As discussed in more detail below, the Bureau believes that the definition of ''loan originator'' set forth in existing § 1026.36(a)(1) is consistent with the definition of ''mortgage originator'' in TILA section 103(cc) as amended by the Dodd-Frank Act. The Bureau also believes that the term ''loan originator'' has been in wide use since first adopted by the Board in 2010. Any changes to the ''loan originator'' terminology could require stakeholders to make equivalent revisions in many aspects of their operations, including in policies and procedures, compliance materials, and software and training. In addition, for the reasons discussed below, the Bureau is proposing two new definitions, in proposed § 1026.36(a)(1)(ii) and (iii), to establish the terms ''loan originator organization'' and ''individual loan originator.''

The Bureau also proposes to add new § 1026.36(a)(3) to define compensation. The proposal transfers guidance on the meaning of the term ''compensation'' in current comment 36(d)(1)– to § 1026.36(a)(3). Other guidance regarding the term ''compensation'' in comment 36(d)(1)–1 is proposed to be transferred to new comment 36(a)–5 and revised.

36(a)(1) Loan Originator

36(a)(1)(i)

The Bureau is proposing to re-designate § 1026.36(a)(1) as § 1026.36(a)(1)(i) and to make certain amendments to it and its commentary, as discussed below, to reflect new TILA section 103(cc)(2). TILA section 103(cc)(2)(A) defines ''mortgage originator'' to mean: ''any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.'' TILA section 103(cc)(2)(B) further defines a mortgage originator as including ''any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide any of the services or perform any of the activities described in subparagraph A.'' TILA section 103(cc)(2)(C) through (G) provides certain exclusions from the general definition of mortgage originator, as discussed below.

In current § 1026.36(a)(1), the term ''loan originator'' means ''with respect to a particular transaction, a person who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person.'' The Bureau broadly interprets the phrase ''arranges, negotiates, or otherwise obtains an extension of consumer credit for another person'' in the definition of ''loan originator.'' [41] The Bureau believes the phrase includes the specific activities set forth in TILA section 103(cc)(2)(A), including: (1) Takes a loan application; (2) assists a consumer in obtaining or applying to obtain a loan; or (3) offers or negotiates terms of a loan.

The meaning of the term ''arranges'' is very broad,[42] and the Bureau believes that it includes any part of the process of originating a credit transaction, including advertising or communicating to the public that one can perform loan origination services and referrals of a consumer to another person who participates in the process of originating a transaction (subject to administrative, clerical and other applicable exclusions discussed in more detail below). That is, the definition includes persons who participate in arranging a credit transaction with others and persons who arrange the transaction entirely, including initial contact with the consumer, assisting the consumer to apply for a loan, taking the application, offering and negotiating loan terms, and consummation of the credit transaction.

These statutory refinements to the phrase, ''assists a consumer in obtaining or applying to obtain a residential mortgage loan,'' suggest that minor actions, *e.g.,* accepting a completed application form and delivering it to a loan officer, without assisting the consumer in completing it, processing or analyzing the information, or discussing loan terms, would not be included in the definition. In this situation, the person is not engaged in any action specific to actively aiding or further achieving a complete loan application or collecting information on behalf of the consumer specific to a mortgage loan. This interpretation is also consistent with the exclusion in TILA section 103(cc)(2)(C)(i) for certain administrative and clerical persons, which is discussed in more detail below.

Nevertheless, the Bureau proposes to add ''takes an application'' and ''offers,'' as used in the definition of ''mortgage originator'' in TILA section 103(cc)(2)(A), to the definition of ''loan originator'' in current § 1026.36(a). The Bureau believes that, even though the definition of ''loan originator'' in current § 1026.36(a) includes the meaning of these terms, expressly stating them clarifies that the definition

[41] This is consistent with the Board's related rulemakings on this issue. *See* 75 FR 58509, 58518 (Sept. 24, 2010); 74 FR 43232, 43279 (Aug. 26, 2009); 73 FR 44522, 44565 (July 30, 2008); 73 FR 1672, 1726 (Jan. 9, 2008); 76 FR 27390, 27402 (May 11, 2011).

[42] Arrange is defined by Merriam-Webster Online Dictionary to include: (1) ''to put into a proper order or into a correct or suitable sequence, relationship, or adjustment;'' (2) ''to make preparations for;'' (3) ''to bring about an agreement or understanding concerning.'' *Arrange Definition,* Merriam-Webster.com, available at: *http://www.merriam-webster.com/dictionary/arrange.*

of ''loan originator'' in § 1026.36(a) includes the core elements of the definition of ''mortgage originator'' in TILA section 103(cc)(2)(A). Inclusion of the terms also facilitates compliance with TILA by removing any risk of uncertainty on this point.

Arranges, Negotiates, or Otherwise Obtains

TILA section 103(cc)(2) defines ''mortgage originator'' to include a person who ''takes a residential mortgage loan application'' and ''assists a consumer in obtaining or applying to obtain a residential mortgage loan.'' TILA section 103(cc)(4) provides that a person ''assists a consumer in obtaining or applying to obtain a residential mortgage loan'' by taking actions such as ''advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.'' The Bureau proposes comment 36(a)–1.i.A to provide further guidance on the existing phrase ''arranges, negotiates, or otherwise obtains,'' as used in § 1026.36(a)(1), to clarify the phrase's applicability in light of these statutory provisions. Specifically, the Bureau proposes to clarify in comment 36(a)–1.i.A that ''takes an application, arranges, offers, negotiates, or otherwise obtains an extension of consumer credit for another person'' includes ''assists a consumer in obtaining or applying for consumer credit by advising on credit terms (including rates, fees, and other costs), preparing application packages (such as a loan or pre-approval application or supporting documentation), or collecting information on behalf of the consumer to submit to a loan originator or creditor, and includes a person who advertises or communicates to the public that such person can or will provide any of these services or activities.''

Advising on Residential Mortgage Loan Terms

TILA section 103(cc)(2)(A)(ii) provides that a mortgage originator includes a person who ''assists a consumer in obtaining or applying to obtain a residential mortgage loan.'' TILA section 103(cc)(4) defines this phrase to include persons ''advising on residential mortgage loan terms (including rates, fees, and other costs).'' Thus, this section applies to persons advising on credit terms (including rates, fees, and other costs) advertised or offered by that person on its own behalf or for another person. The Bureau believes that the definition of ''mortgage originator'' does not include bona fide third-party advisors such as accountants, attorneys, registered financial advisors, certain housing counselors, or others who do not receive or are paid no compensation for originating consumer credit transactions. Should these persons receive payments or compensation from loan originators, creditors, or their affiliates in connection with a consumer credit transaction, however, they could be considered loan originators.

Advertises or Communicates

TILA section 103(cc)(2)(B) provides that a mortgage originator ''includes any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide any of the services or perform any of the activities described in subparagraph (A).'' The Bureau believes the current definition of ''loan originator'' in § 1026.36(a) includes persons who in expectation of compensation or other monetary gain communicate or advertise loan origination activities or services to the public.

The Bureau therefore proposes to amend comment 36(a)–1.i.A to clarify that a loan originator ''includes a person who in expectation of compensation or other monetary gain advertises or communicates to the public that such person can or will provide any of these [loan origination] services or activities.'' The Bureau notes that the phrase ''advertises or communicates to the public'' is very broad and includes, but is not limited to, the use of business cards, stationery, brochures, signs, rate lists, or other promotional items listed in TILA section 103(cc)(2)(B) if these items advertise or communicate to the public that a person can or will provide loan origination services or activities. The Bureau believes this clarification furthers TILA's goal in section 129B(a)(2) of ensuring that responsible, affordable credit remains available to consumers. The Bureau also invites comment on this clarification to the definition of loan originator.

Manufactured Home Retailers

The definition of ''mortgage originator'' in TILA section 103(cc)(2)(C)(ii) also expressly excludes certain employees of manufactured home retailers. The definition of ''loan originator'' in current § 1026.36(a)(1) does not address such employees. The Bureau proposes to implement the new statutory exclusion by revising the definition of ''loan originator'' in § 1026.36(a)(1) to exclude employees of a manufactured home retailer who assist a consumer in obtaining or applying to obtain consumer credit, provided such employees do not take a consumer credit application, offer or negotiate terms of a consumer credit transaction, or advise a consumer on credit terms (including rates, fees, and other costs).

Creditors

Current § 1026.36(a) includes in the definition of loan originator only creditors that do not finance the transaction at consummation out of the creditor's own resources, including, for example, drawing on a bona fide warehouse line of credit, or out of deposits held by the creditor (table-funded creditors). TILA section 129B(b), as added by section 1402 of the Dodd-Frank Act, imposes new qualification and loan document unique identifier requirements that apply under certain circumstances to all creditors, including non-table-funded creditors, which are not loan originators for other purposes. Section 1401 of the Dodd-Frank Act amended TILA to add section 103(cc)(2)(F), which provides that the definition of ''mortgage originator'' expressly excludes creditors (other than creditors in table-funded transactions) for purposes of section 129B(c)(1), (2), and (4). Those provisions contain restrictions on steering activities and rules of construction for the statute. Thus, the term ''mortgage originator'' includes creditors for purposes of other TILA provisions that use the term, such as section 129B(b), as added by section 1402 of the Dodd-Frank Act. Section 129B(b) imposes on mortgage originators new qualification and loan document unique identifier requirements, discussed below under § 1026.36(f) and (g). The Bureau therefore proposes to amend the definition of loan originator in § 1026.36(a)(1)(i) to include creditors (other than creditors in table-funded transactions) for purposes of those provisions only.

The Bureau also proposes to make technical amendments to comment 36(a)–1.ii on table funding to clarify the applicability of TILA section 129B(b)'s new requirements to all creditors. Non-table-funded creditors are included in the definition of loan originator only for the purposes of § 1026.36(f) and (g). The proposed revisions additionally clarify the applicability of § 1026.36 to table-funded creditors.

Servicers

TILA section 103(cc)(2)(G) defines ''mortgage originator'' not to include ''a servicer or servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing or subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.'' The term ''servicer'' is defined by TILA section 103(cc)(7) as having the same meaning as ''servicer'' ''in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974 [RESPA] (12 U.S.C. 2605(i)(2)).''

RESPA defines the term ''servicer'' as ''the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan).''[43] The term ''servicing'' is defined to mean ''receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title [Title 12], and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.'' 12 U.S.C. 2605(i)(3).

Current comment 36(a)–1.iii provides that the definition of ''loan originator'' does not ''apply to a loan servicer when the servicer modifies an existing loan on behalf of the current owner of the loan. The rule only applies to extensions of consumer credit and does not apply if a modification of an existing obligation's terms does not constitute a refinancing under § 1026.20(a).'' The Bureau proposes to amend comment 36(a)–1.iii to clarify how the definition of loan originator applies to servicers and to implement the Dodd-Frank Act's definition of mortgage originator.

The Bureau believes the exception in TILA section 103(cc)(2)(G) narrowly applies to servicers, servicer employees, agents and contractors only when engaging in limited servicing activities with respect to a particular transaction after consummation, including loan modifications that do not constitute a refinancing. The Bureau does not believe, however, that the statutory exclusion was intended to shield from coverage companies that intend to act as servicers on loans when they engage in loan origination activities prior to consummation or servicers of existing loans that refinance such loans. The Bureau believes that exempting such companies merely because of the general status of ''servicer'' with respect to some loans would not reflect Congress's intended statutory scheme.

The Bureau's interpretation rests on analyzing the two distinct parts of the statute. Under TILA section 103(cc)(2)(G), the definition of ''mortgage originator'' does not include: (1) ''a servicer'' or (2) ''servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.'' Under a textual analysis of this provision in combination with the definition of ''servicer'' under RESPA in 12 U.S.C. 2605(i)(2), which is referenced by TILA section 103(cc)(7), a servicer that is responsible for servicing a loan or that makes a loan *and* services it is excluded from the definition of ''mortgage originator'' for that particular loan after the loan is consummated and the servicer becomes responsible for servicing it. ''Servicing'' is defined under RESPA as ''receiving and making payments according to the terms of the loan.'' Thus, a servicer cannot be responsible for servicing a loan that does not exist. A loan exists only after consummation. Therefore, for purposes of TILA section 103(cc)(2)(G), a person is a servicer with respect to a particular transaction only after it is consummated and that person retains or obtains its servicing rights.

The Bureau believes this interpretation of the statute is the most consistent with the definition of ''mortgage originator'' in TILA section 103(cc)(2). A person cannot be a servicer until after consummation of a transaction. A person taking an application, assisting a consumer in obtaining or applying to obtain a loan, or offering or negotiating terms of a loan, or funding the transaction prior to and through the time of consummation, is a mortgage originator or creditor (depending upon the person's role). Thus, a person that funds a loan from the person's own resources or a table-funded creditor is subject to the appropriate provisions in TILA section 103(cc)(2)(F) for creditors until the person becomes responsible for servicing the loan after consummation. The Bureau believes this interpretation is also consistent with the definition of ''loan originator'' in current § 1026.36(a) and comment 36(a)–1.iii. If a loan modification by the servicer constitutes a refinancing under § 1026.20(a), the servicer is considered a creditor until after consummation of the refinancing when responsibility for servicing the refinanced loan arises.

The Bureau believes the second part of the statutory provision applies to individuals (*i.e.,* natural persons) who are employees, agents or contractors of the servicer, ''including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.'' The Bureau further believes that, to be considered employees, agents or contractors of the servicer for the purposes of TILA section 103(cc)(2)(G), the person for whom the employees, agent or contractors are working first must be a servicer. Thus, as discussed above, the particular loan must have already been consummated before such employees, agents, or contractors can be excluded from the statutory term, ''mortgage originator'' under TILA section 103(cc)(2)(G).

The Bureau interprets the phrase ''including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind'' to be an example of the types of activities the individuals are permitted to engage in that satisfy the purposes of TILA section 103(cc)(2)(G). However, the Bureau believes that ''renegotiating, modifying, replacing and subordinating principal of existing mortgages'' or any other related activities that occur must not be a refinancing, as defined in § 1026.20(a), for the purposes of TILA section 103(cc)(2)(G). Under the Bureau's view, a servicer may modify an existing loan in several ways without being considered a loan originator. A formal satisfaction of the existing obligation and replacement by a new obligation is a refinancing. But, short of that, a

[43] RESPA defines ''servicer'' to exclude: (A) The FDIC in connection with changes in rights to assets pursuant to section 1823(c) of title 12 or as receiver or conservator of an insured depository institution; and (B) Ginnie Mae, Fannie Mae, Freddie Mac, or the FDIC, in any case in which changes in the servicing of the mortgage loan is preceded by (i) termination of the servicing contract for cause; (ii) commencement of bankruptcy proceedings of the servicer; or (iii) commencement of proceedings by the FDIC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled). 12 U.S.C. 2605(i)(2).

servicer may modify a loan without being considered a loan originator.

The Bureau interprets the term ''replacing'' in TILA section 103(cc)(2)(G) not to include refinancings of consumer credit. The term ''replacing'' is not defined in TILA or Regulation Z, but the Bureau believes the term ''replacing'' in this context means replacing existing debt without also satisfying the original obligation. For example, a first- and second-lien loan may be ''replaced'' by a single, new loan with a reduced interest rate and principal amount, the proceeds of which do not satisfy the full obligation of the prior loans. In such a situation, the agreement for the new loan may stipulate that the consumer is responsible for the remaining outstanding balances of the prior loans if the consumer refinances or defaults on the replacement loan within a stated period of time. This is conceptually distinct from a refinancing as described in § 1026.20(a), which refers to situations where an existing ''obligation *is satisfied and replaced* by a new obligation.'' [44] (Emphasis added.)

The ability to repay provisions of TILA section 129C, which were added by section 1411 of the Dodd-Frank Act, make numerous references to certain ''refinancings'' for exemptions from the income verification requirement of section 129C. TILA section 128A, as added by section 1419 of the Dodd-Frank Act, contains a disclosure requirement that includes a ''refinancing'' as an alternative for consumers of hybrid adjustable rate mortgages to pursue before the interest rate adjustment or reset after the fixed introductory period ends. Moreover, TILA's text prior to Dodd-Frank Act amendments contained the term ''refinancing'' in numerous provisions. For example, TILA section 106(f)(2)(B) provides finance charge tolerance requirements specific to a ''refinancing,'' TILA section 125(e)(2) exempts certain ''refinancings'' from right of rescission disclosure requirements, and TILA section 128(a)(11) requires disclosure of whether the borrower is entitled to a rebate upon ''refinancing'' an obligation in full that involves a precomputed finance charge. For these reasons the Bureau believes that, if Congress intended for ''replacing'' to include or mean a ''refinancing'' of consumer credit, Congress would have used the existing term, ''refinancing,'' as Congress did for sections 1411 and 1419 of the Dodd-Frank Act and in prior TILA legislation. Instead, without any additional guidance from Congress, the Bureau defers to the current definition of ''refinancing'' in § 1026.20(a), where part of the definition of ''refinancing'' requires both replacement and satisfaction of the original obligation as separate and distinct elements of the defined term.

Furthermore, the above interpretation of ''replacing'' better accords with the surrounding statutory text, which provides that servicers include persons offering or negotiating a residential mortgage loan for the purposes of ''renegotiating, modifying, replacing or subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.'' Taken as a whole, this text applies to distressed consumers for whom replacing and fully satisfying the existing obligation(s) is not an option. The situation covered by the text is distinct from a refinancing in which a consumer would simply use the proceeds from the refinancing to satisfy an existing loan or existing loans.

The Bureau believes this interpretation gives full effect to the exclusionary language as Congress intended, to avoid undesirable impacts on servicers' willingness to modify existing loans to benefit distressed consumers, without undermining the new protections generally afforded by TILA section 129B. A broader interpretation that excludes servicers and their employees, agents, and contractors from those protections solely by virtue of their coincidental status as servicers is not the best reading of the statute as a whole and likely would frustrate rather than further congressional intent.

Indeed, if persons are not included in the definition of mortgage originator when making but prior to servicing a loan or based on a person's status as a servicer under the definition of ''servicer,'' at least two-thirds of mortgage lenders (and their originator employees) nationwide could be excluded from the definition of ''mortgage originator'' in TILA section 103(cc)(2)(G). Many, if not all, of the top ten mortgage lenders by volume either hold and service loans they originated in portfolio or retain servicing rights for the loans they originate and sell into the secondary market.[45] Under an interpretation that would categorically exclude a person who makes and services a loan or whose general ''status'' is a ''servicer,'' these lenders would be excluded as ''servicers'' from the definition of ''mortgage originator.'' Thus, their employees and agents would also be excluded from the definition under this interpretation.

The Bureau believes this result would be not only contrary to the statutory text but also contrary to Congress's stated intent in section 1402 of the Dodd-Frank Act to ensure that responsible, affordable mortgage credit remains available to consumers by regulating practices related to residential mortgage loan origination. For example, based on the top ten mortgage lenders by origination and servicing volume alone, as much as 61 percent of the nation's loan originators could not only be excluded from prohibitions on dual compensation and compensation based on loan terms but also from the new qualification requirements added by the Dodd-Frank Act.

The Bureau proposes to amend comment 36(a)–1.iii to reflect the Bureau's interpretation of the statutory text, to facilitate compliance, and to prevent circumvention. The Bureau interprets the statement in existing comment 36(a)–1.iii that the ''definition of 'loan originator' does not apply to a loan servicer when the servicer modifies an existing loan on behalf of the current owner of the loan'' as consistent with the definition of mortgage originator as it relates to servicers in TILA section 103(cc)(2)(G). Proposed comment 36(a)–1.iii thus clarifies that the TILA section 103(cc)(2)(G) definition of ''loan originator'' includes a servicer or a servicer's employees, agents, and contractors when offering or negotiating terms of a particular existing loan obligation on behalf of the current owner for purposes of renegotiating, modifying, replacing, or subordinating principal of such a debt where the borrower(s) is not current, in default, or has a reasonable likelihood of becoming in default or not current. The Bureau proposes to amend comment 36(a)–1.iii to clarify that § 1026.36 ''only applies to

[44] Comment 20(a)–1 clarifies: ''The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation *must completely replace* the prior one.'' (Emphasis added).

[45] For example, the top ten U.S. lenders by mortgage origination volume in 2011 held 72.7 percent of the market share. 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 52–53 (2012) (these percentages are based on the dollar amount of the loans). These same ten lenders held 60.8 percent of the market share for servicing mortgage loans. 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 185–186 (2012) (these percentages are based on the dollar amount of the loans). Most of the largest lenders do not ordinarily sell loans into the secondary market with servicing released.

extensions of consumer credit that constitute a refinancing under § 1026.20(a). Thus, the rule does not apply if a renegotiation, modification, replacement, or subordination of an existing obligation's terms occurs, unless it is a refinancing under § 1026.20(a).''

Real Estate Brokers

TILA section 103(cc)(2)(D) states that the definition of ''mortgage originator'' does not ''include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person or entity is compensated by a lender, a mortgage broker, or other mortgage originator or by any agent of such lender, mortgage broker, or other mortgage originator.'' Thus, the statute provides that real estate brokers are not included in the definition of ''mortgage originator'' if they: (1) Only perform real estate brokerage activities, (2) are licensed or registered under applicable State law to perform such activities, and (3) do not receive compensation from loan originators, creditors, or their agents. Therefore, a real estate broker that performs loan originator activities or services as defined by proposed § 1026.36(a) is a loan originator for the purposes of § 1026.36.[46] The Bureau proposes to add comment 36(a)–1.iv to clarify that the term loan originator does not include certain real estate brokers.

The Bureau believes the text of TILA section 103(cc)(2)(D) related to payments to a real estate broker ''by a lender, a mortgage broker, or other mortgage originator or by any agent of such lender, mortgage broker, or other mortgage originator'' is directed at payments by such persons in connection with the origination of a particular consumer credit transaction secured by a dwelling. Each of the three core elements in the definition of mortgage originator in TILA section 103(cc)(2)(A) describes activities related to a residential mortgage loan.[47] Moreover, if real estate brokers are deemed mortgage originators simply by receiving compensation from a creditor, then a real estate broker would be considered a mortgage originator if the real estate broker received compensation from a creditor for reasons wholly unrelated to loan origination (*e.g.,* if the real estate broker found new office space for the creditor). The Bureau does not believe that either the definition of ''mortgage originator'' in TILA section 103(cc)(2) or the statutory purpose of TILA section 129B(a)(2) to ''assure consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deception or abusive,'' demonstrate that Congress intended for TILA section 129B to cover this type of real estate brokerage activity. Thus, for a real estate broker to be included in the definition of ''mortgage originator,'' the real estate broker must receive compensation in connection with performing one or more of the three core ''mortgage originator'' activities for a particular consumer credit transaction secured by a dwelling.

For example, assume XYZ Bank pays a real estate broker for a broker price opinion in connection with a pending modification or default of a mortgage loan for consumer A. In an unrelated transaction, consumer B compensates the same real estate broker for assisting consumer B with finding and negotiating the purchase of a home. Consumer B also obtains credit from XYZ Bank to purchase the home. This real estate broker is not a loan originator under these facts. Proposed comment 36(a)–1.iv clarifies this point. The proposed comment also clarifies that a payment is not from a creditor, a mortgage broker, other mortgage originator, or an agent of such persons if the payment is made on behalf of the consumer to pay the real estate broker for real estate brokerage activities performed for the consumer.

The Bureau notes that the definition of ''mortgage originator'' in the statute does not ''include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law.'' The Bureau believes that, if applicable State law defines real estate brokerage activities to include activities that fall within the definition of loan originator in § 1026.36(a), the real estate broker is a loan originator when engaged in such activities subject to § 1026.36 and is not a real estate broker under TILA section 103(cc)(2)(D). The Bureau invites comment on this proposed clarification of the meaning of ''loan originator'' for real estate brokers.

Seller Financing

TILA section 103(cc)(2)(E) provides that the term ''mortgage originator'' does not include:

> with respect to a residential mortgage loan, a person, estate, or trust that provides mortgage financing for the sale of 3 properties in any 12-month period to purchasers of such properties, each of which is owned by such person, estate, or trust and serves as security for the loan, provided that such loan—(i) is not made by a person, estate, or trust that has constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of such person, estate, or trust; (ii) is fully amortizing; (iii) is with respect to a sale for which the seller determines in good faith and documents that the buyer has a reasonable ability to repay the loan; (iv) has a fixed rate or an adjustable rate that is adjustable after 5 or more years, subject to reasonable annual and lifetime limitations on interest rate increases; and (v) meets any other criteria the Bureau may prescribe.

This provision must be read in conjunction with the existing exceptions in Regulation Z (§ 1026.2(a)(17)(v)), which provide that the definition of creditor: (1) Does not include persons that extend credit secured by a dwelling (other than high-cost mortgages) five or fewer times in the preceding calendar year and (2) does not include a person who extends no more than one high-cost mortgage (subject to § 1026.32) in any 12-month period. Based on the definition of mortgage originator as described above and the exception for creditor together, the Bureau believes that persons, estates, or trusts are not included in the definition of ''mortgage originator'' when engaged in such described activities. That is, any person, estate, or trust who otherwise would be a mortgage originator under the statutory definition on the basis of engaging in activities other than those described above is a mortgage originator. Thus, only persons whose activity is financing sales of their own properties as described above are excluded under TILA section 103(cc)(2)(E). A person who finances sales of property, if such financing is subject to a finance charge or payable in more than four installments, generally is a creditor under § 1026.2(a)(17)(i) (except where excluded by virtue of the person's annual transaction volume).

Moreover, TILA section 103(cc)(2)(F) provides that the definition of mortgage originator does not include creditors (other than creditors in table-funded transactions), except for purposes of TILA section 129B(c)(1), (2), and (4). Thus, those creditors that are not included in the definition of mortgage

[46] The Bureau understands that a real estate broker license in some states also permits the licensee to broker mortgage loans and in certain cases make mortgage loans. The Bureau does not consider brokering mortgage loans and making mortgage loans to be real estate brokerage activities.

[47] The three core elements in the definition of mortgage originator in TILA section 103(cc)(2)(A) are: ''(i) Takes *a residential mortgage loan* application; (ii) assists a consumer in obtaining or applying to obtain *a residential mortgage loan;* or (iii) offers or negotiates terms of *a residential mortgage loan.''* (Emphasis added).

originator as a result of TILA section 103(cc)(2)(E) are still subject to the remaining provisions of TILA section 129B. Of these provisions of TILA section 129B, only section 129B(b)(1) imposes any substantive requirements on creditors: the qualification requirements and the requirement to include a unique identifier on loan documents, implemented by proposed § 1026.36(f) and (g).

The proposed definition of loan originator, however, would not include seller financers who finance three or fewer sales in any 12-month period without extending high-cost mortgage financing. The proposed definition of the term loan originator includes ''a *creditor for the transaction* if the creditor does not finance the transaction at consummation *out of the creditor's own resources,* including drawing on a *bona fide* warehouse line of credit, or out of deposits held by the creditor'' (emphasis added). The term ''creditor for the transaction'' is intended to apply to persons who would otherwise be a ''creditor'' as defined in § 1026.2(a)(17) but for the exception for not regularly extending consumer credit. Therefore, such a seller financer who finances three or fewer sales with a non-high cost mortgage in any 12-month period is a ''creditor for the transaction,'' and is included neither in the definition of loan originator in § 1026.36(a) nor the definition of creditor in § 1026.2(a)(17). Thus, these persons are not subject to TILA and Regulation Z, including § 1026.36.

Section 1026.2(a)(17)(v) excludes from the definition of creditor persons that extend credit secured by a dwelling (other than high-cost mortgages) five or fewer times in the preceding calendar year. This has two implications. First, if a person's activity is limited to financing sales of three or fewer properties in any 12-month period by making extensions of credit that are not high-cost mortgages, the person cannot exceed the five-loan threshold in § 1026.2(a)(17)(v) to be deemed a creditor and therefore be subject to any provision of Regulation Z, including § 1026.36. Second, a person who finances the sale of no more than one property in any 12-month period by making an extension of one high-cost mortgage also is not a creditor under § 1026.2(a)(17)(v). Thus, this person is not a creditor for the purposes of being included in the definition of ''mortgage originator'' as described by TILA section 103(cc)(2)(F). This person also is not subject to Regulation Z, including § 1026.36.

Given all of the foregoing, the only persons that are not included in the definition of mortgage originator as provided in TILA section 103(cc)(2)(E), but are creditors for the purposes of Regulation Z, are persons, estates, or trusts that finance the sale of their own properties by extending high-cost mortgages either twice or three times in a calendar year. Thus, such persons are not subject to § 1026.36(f) and (g) because, they are not a loan originator and thus also are not subject to the other provisions of § 1026.36. Nevertheless, to reflect this interpretation that a narrow category of persons are not included in the definition of loan originator in § 1026.36(a), the Bureau is proposing new comment 36(a)–1.v.

Proposed comment 36(a)–1.v tracks the criteria set forth in TILA section 103(cc)(2)(E). The comment provides that the definition of ''loan originator'' does not include a natural person, estate, or trust that finances the sale of three or fewer properties in any 12-month period owned by such natural person, estate, or trust where each property serves as a security for the credit transaction. It further states that the natural person, estate, or trust also must not have constructed or acted as a contractor for the construction of the dwelling in its ordinary course of business. The natural person, estate, or trust must additionally determine in good faith and document that the buyer has a reasonable ability to repay the credit transaction. Finally, the proposed comment states that the credit transaction must be fully amortizing, have a fixed rate or an adjustable rate that adjusts only after five or more years, and be subject to reasonable annual and lifetime limitations on interest rate increases.

The Bureau also is proposing to include further guidance in the comment as to how a person may satisfy the requirement to determine in good faith that the buyer has a reasonable ability to repay the credit transaction. The comment would provide that the natural person, estate, or trust makes such a good faith determination by complying with the requirements of § 1026.43. This refers to the requirements applicable generally to credit extensions secured by a dwelling, as proposed by the Board in its 2011 ATR Proposal. Those requirements implement TILA section 129C, and the language of section 129C(a)(1) parallels in almost identical language the ability to repay requirement in TILA section 103(cc)(2)(E). Any creditor seeking to rely on proposed comment 36(a)–1.v to avoid inclusion in the definition of loan originator (*i.e.,* creditors as defined by § 1026.2(a)(17)(v) making a second or a third high-cost mortgage in a calendar year) already must comply with the requirements of proposed § 1026.43 as well as the provisions of Regulation Z other than § 1026.36.

Administrative or Clerical Tasks

TILA section 103(cc)(2)(C) defines ''mortgage originator'' to exclude persons who are not otherwise described by the three core elements of the mortgage originator definition or communicate to the public or advertise they can perform or provide the services described in those elements and who perform purely administrative or clerical tasks on behalf of mortgage originators. Existing comment 36(a)–4 clarifies that managers, administrative staff, and similar individuals who are employed by a creditor or loan originator but do not arrange, negotiate, or otherwise obtain an extension of credit for a consumer, or whose compensation is not based on whether any particular loan is originated, are not loan originators. The Bureau believes the existing comment is largely consistent with TILA section 103(cc)(2)(C)'s treatment of administrative and clerical tasks.

The Bureau proposes a minor technical revision to comment 36(a)–4, however, to implement the exclusion from ''mortgage originator'' in TILA section 103(cc)(2)C), by including ''clerical'' staff. The proposed revisions would also clarify that producing managers who also meet the definition of a loan originator would be considered a loan originator. Producing managers generally are managers of an organization (including branch managers and senior executives) that in addition to their management duties also originate loans. Thus, compensation received by producing managers would be subject to the restrictions of § 1026.36. Non-producing managers (*i.e.,* managers, senior executives, etc., who have a management role in an organization including, but not limited to, managing loan originators, but who do not otherwise meet the definition of loan originator) would not be considered a loan originator.

36(a)(1)(ii); 36(a)(1)(iii)

Certain provisions of TILA section 129B, such as the qualification and loan document unique identifier requirements, as well as certain new guidance in the Bureau's proposal, necessitate a distinction between loan originators that are natural persons and those that are organizations. The Bureau therefore proposes to establish the distinction by creating new definitions for ''individual loan originator'' and

''loan originator organization'' in new § 1026.36(a)(1)(ii) and (iii).

The Bureau proposes to revise comment 36(a)–1.i.B to clarify that the term ''loan originator organization'' is a loan originator other than a natural person, including but not limited to a trust, sole proprietorship, partnership, limited liability partnership, limited partnership, limited liability company, corporation, bank, thrift, finance company, or a credit union. The Bureau understands that States have recognized many new business forms over the past 10 to 15 years. The Bureau believes that the additional examples should help to facilitate compliance with § 1026.36 by clarifying the types of persons that fall within the definition of ''loan originator organization.'' The Bureau invites comment on whether other examples would be helpful for these purposes.

36(a)(2) Mortgage Broker

Existing § 1026.36(a)(2) defines ''mortgage broker'' as ''any loan originator that is not an employee of the creditor.'' As noted elsewhere, under this proposal the meaning of loan originator is expanded for purposes of § 1026.36(f) and (g) to include all creditors. The Bureau is therefore proposing a conforming amendment to exclude such creditors from the definition of ''mortgage broker'' even though for certain purposes such creditors are loan originators. Proposed § 1026.36(a)(2) provides that a mortgage broker is ''any loan originator that is not a creditor or the creditor's employee.''

36(a)(3) Compensation

The Bureau proposes to define the term ''compensation'' in new § 1026.36(a)(3) to include ''salaries, commissions, and any financial or similar incentive provided to a loan originator for originating loans.'' Sections 1401 and 1403 of the Dodd-Frank Act contain multiple references to the term ''compensation'' but do not define the term. The current rule does not define the term in regulatory text. Existing comment 36(d)(1)–1, however, provides guidance on the meaning of compensation. The Bureau's proposal reflects the basic principle of that guidance in proposed § 1026.36(a)(3). The further guidance in comment 36(d)(1)–1 would be transferred to new comment 36(a)–5.

The Bureau proposes to add comment 36(a)–5.iii (re-designated from comment 36(d)(1)–1.iii and essentially the same as that comment, except as noted below) to be consistent with provisions set forth in TILA section 129B(c)(2), as added by section 1403 of the Dodd-Frank Act. Specifically, TILA section 129B(c)(2)(A) provides that, for any residential mortgage loan, a mortgage originator generally may not receive from any person other than the consumer any origination fee or charge except bona fide third-party charges not retained by the creditor, the mortgage originator, or an affiliate of either. Likewise, no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator, may pay a mortgage originator any origination fee or charge except bona fide third-party charges as described above. In addition, section TILA 129B(c)(2)(B) provides that a mortgage originator may receive an origination fee or charge from a person other than the consumer if, among other things, the mortgage originator does not receive any compensation directly from the consumer. As discussed in more detail in the section-by-section analysis to proposed § 1026.36(d)(2)(ii), the Bureau interprets ''origination fee or charge'' to mean compensation that is paid in connection with the transaction, such as commissions that are specific to, and paid solely in connection with, the transaction.

Nonetheless, TILA section 129B(c)(2) does not appear to prevent a mortgage originator from receiving payments from a person other than the consumer for bona fide third-party charges not retained by the creditor, mortgage originator, or an affiliate of either, even if the mortgage originator also receives loan originator compensation directly from the consumer. For example, assume that a mortgage originator receives compensation directly from a consumer in a transaction. TILA section 129B(c)(2) does not restrict the mortgage originator from receiving payment from a person other than the consumer (*e.g.,* a creditor) for bona fide and reasonable charges, such as title insurance or appraisals, where those amounts are not retained by the loan originator but are paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator.

Consistent with TILA section 129B(c)(2) and pursuant to the Bureau's authority under TILA section 105(a) to effectuate the purposes of TILA and facilitate compliance with TILA, the Bureau proposes to retain in new comment 36(a)–5.iii essentially the same guidance as set forth in current comment 36(d)(1)–1.iii. Thus, the new comment clarifies that the term ''compensation'' as used in § 1026.36(d) and (e) does not include amounts a loan originator receives as payment for bona fide and reasonable charges, such as title insurance or appraisals, where those amounts are not retained by the loan originator but are paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. Accordingly, under proposed § 1026.36(d)(2)(i) and comment 36(a)–5.iii, a loan originator that receives compensation directly from a consumer would not be restricted from receiving a payment from a person other than the consumer for such bona fide and reasonable charges. In addition, a loan originator would not be deemed to be receiving compensation directly from a consumer for purposes of § 1026.36(d)(2) where the originator imposes such a bona fide and reasonable third-party charge on the consumer.

Proposed comment 36(a)–5.iii also recognizes that, in some cases, amounts received for payment for such third-party charges may exceed the actual charge because, for example, the originator cannot determine with accuracy what the actual charge will be before consummation when the charge is imposed on the consumer. In such a case, under proposed comment 36(a)–5.iii, the difference retained by the originator would not be deemed compensation if the third-party charge collected from a person other than the consumer was bona fide and reasonable, and also complies with State and other applicable law. On the other hand, if the originator marks up a third-party charge and retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36(d) and (e). This guidance parallels that in existing comment 36(d)(1)–1.

Proposed comment 36(a)–5.iii, like current comment 36(d)(1)–1.iii, contains two illustrations. The illustrations in proposed comment 36(a)–5.iii.A and B are similar to the ones contained in current comment 36(d)(1)–1.iii.A and B except that the illustrations are amended to clarify that the charges described in those illustrations are not paid to the creditor, its affiliates, or the affiliate of the loan originator. The proposed illustrations also simplify the current illustrations.

The first illustration, in proposed comment 36(a)–5.iii.A, assumes a loan originator will receive compensation directly from either a consumer or a creditor. The illustration further assumes the loan originator uses average charge pricing in accordance with Regulation X [48] to charge the consumer

[48] *See* 12 CFR 1024.8(b).

a $25 credit report fee for a credit report provided by a third party that is not the loan originator, creditor, or affiliate of either. At the time the loan originator imposes the credit report fee on the consumer, the loan originator is uncertain of the cost of the credit report because the cost of a credit report from the consumer reporting agency is paid in a monthly bill and varies between $15 and $35 depending on how many credit reports the originator obtains that month. Later, the cost for the credit report is determined to be $15 for this consumer's transaction. In this case, the $10 difference between the $25 credit report fee imposed on the consumer and the actual $15 cost for the credit report is not deemed compensation for purposes of § 1026.36(d) and (e), even though the $10 is retained by the loan originator. Proposed comment 36(a)–5.iii.B provides a second illustration that explains that, in the same example above, the $10 difference would be compensation for purposes of § 1026.36(d) and (e) if the credit report fees vary between $10 and $15.

The Bureau solicits comment on proposed comment 36(a)–5.iii. Specifically, the Bureau requests comment on whether the term ''compensation'' should exclude payment from the consumer or from a person other than the consumer to the loan originator, as opposed to a third party, for certain services that unambiguously relate to ancillary services rather than core loan origination services, such as title insurance or appraisal, if the loan originator, creditor or the affiliates of either performs those services, so long as the amount paid for those services is bona fide and reasonable. The Bureau further solicits comment on how such ancillary services might be described clearly enough to distinguish them from the core origination charges that would not be excluded under such a provision.

The Bureau also proposes new comment 36(a)–5.iv to clarify that the definition of compensation for purposes of § 1026.36(d) and (e) includes stocks, stock options, and equity interests that are provided to individual loan originators and that, as a result, the provision of stocks, stock options, or equity interests to individual loan originators is subject to the restrictions in § 1026.36(d) and (e). The proposed comment further clarifies that bona fide returns or dividends paid on stocks or other equity holdings, including those paid to loan originators who own such stock or equity interests, are not considered compensation for purposes of § 1026.36(d) and (e). The comment explains that: (1) Bona fide returns or dividends are those returns and dividends that are paid pursuant to documented ownership or equity interests allocated according to capital contributions and where the payments are not mere subterfuges for the payment of compensation based on loan terms and (2) bona fide ownership or equity interests are ownership or equity interests not allocated based on the terms of a loan originator's transactions. The comment gives an example of a limited liability company (LLC) loan originator organization that allocates its members' respective equity interests based on the member's transaction terms; in that instance, the distributions are not bona fide and, thus, are considered compensation for purposes of § 1026.36(d) and (e). The Bureau believes the clarification provided by proposed comment 36(a)–5.iv is necessary to distinguish legitimate returns on ownership from returns on ownership in companies that manipulate business ownership structures as a means to circumvent the restrictions on compensation in § 1026.36(d) and (e).

The Bureau invites comment on comment 36(a)–5.iv as proposed and on whether other forms of corporate structure or returns on ownership interest should be specifically addressed in the definition of ''compensation.'' The Bureau also seeks comment generally on other methods of providing incentives to loan originators that the Bureau should consider specifically addressing in the proposed guidance on the definition of ''compensation.''

36(d)) Prohibited Payments to Loan Originators

36(d)(1) Payments Based on Transaction Terms

Section 1026.36(d)(1)(i), which was added to Regulation Z by the Board's 2010 Loan Originator Final Rule, provides that, in connection with a consumer credit transaction secured by a dwelling, ''no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions.'' Section 1026.36(d)(1)(ii) states that the amount of credit extended is not deemed to be a transaction term or condition, provided compensation received by or paid to a loan originator, directly or indirectly, is based on a fixed percentage of the amount of credit extended; the provision also states that such compensation may be subject to a minimum or maximum dollar amount. Section 1026.36(d)(1)(iii) provides that § 1026.36(d)(1)(i) does not apply to any transaction subject to § 1026.36(d)(2) (*i.e.,* where a consumer pays a loan originator directly).

In adopting its 2010 Loan Originator Final Rule, the Board noted that ''compensation payments based on a loan's terms or conditions create incentives for loan originators to provide consumers loans with higher interest rates or other less favorable terms, such as prepayment penalties,'' citing ''substantial evidence that compensation based on loan rate or other terms is commonplace throughout the mortgage industry, as reflected in Federal agency settlement orders, congressional hearings, studies, and public proceedings.'' 75 FR 58520. Among the Board's stated concerns was: ''Creditor payments to brokers based on the interest rate give brokers an incentive to provide consumers loans with higher interest rates. Large numbers of consumers are simply not aware this incentive exists.'' [49] *Id.* The official commentary to § 1026.36(d)(1) provides further guidance regarding the general prohibition on loan originator compensation based on terms and conditions of loans.

Since the Board's 2010 Loan Originator Final Rule was promulgated, the Board and the Bureau (following the transfer of authority over TILA to the Bureau under the Dodd-Frank Act) have received numerous interpretive questions about the provisions of § 1026.36(d)(1). First, questions have arisen about the application of the Board's rule to payments that are based on factors that may be ''proxies'' for loan terms. The Bureau understands there has been considerable uncertainty on this issue. Furthermore, mortgage creditors and others have raised questions about whether § 1026.36(d)(1) prohibits the pooling of compensation and sharing in such pooled compensation by loan originators that are compensated differently and originate loans with different terms.

The Board and the Bureau also have received a number of questions about

[49] The Board adopted this prohibition on certain compensation practices based on its finding that compensating loan originators based on a loan's terms or conditions, other than the amount of credit extended, is an unfair practice that causes substantial injury to consumers. *Id.* The Board stated that it was relying on authority under TILA section 129(l)(2) (since re-designated as section 129(p)(2)) to prohibit acts or practices in connection with mortgage loans that it finds to be unfair or deceptive. *Id.* The Board decided to issue its 2010 Loan Originator Final Rule even though a subsequent rulemaking was necessary to implement TILA section 129B(c). *See* 75 FR at 58509. As discussed below, Dodd-Frank Act section 1403 provides an additional express statutory base of authority for the Bureau's rulemaking.

whether, and how, the current regulation applies to employer contributions to profit-sharing, 401(k), and employee stock ownership plans (ESOPs) that are qualified under section 401(a) of the Internal Revenue Code and how the regulation applies to compensation paid pursuant to employer-sponsored profit-sharing plans that are not qualified plans. These questions have arisen because often the amount of payments to individual loan originators under profit-sharing plans and of contributions to qualified or non-qualified plans in which individual loan originators participate will depend substantially on the profits of the creditors and the loan originator organizations, which in turn often may depend in part on the terms of the loans generated by the individual loan originators, such as the interest rate. In response to these questions, the Bureau issued a bulletin on April 2, 2012 (CFPB Bulletin 2012–2), clarifying that, until the Bureau adopts final rules implementing the Dodd-Frank Act provisions regarding loan originator compensation, an employer may make contributions to a qualified retirement plan out of a pool of profits derived from loans originated by the company's loan originator employees. CFPB Bulletin 2012–02 (Apr. 2, 2012).[50] The Bureau did not believe it was practical at the time, however, to provide guidance on the application of the current rules to plans that are not qualified plans because such questions are fact-specific in nature. *Id.* The Bureau noted that it anticipated providing greater clarity on these arrangements in connection with a proposed rule on the loan origination provisions in the Dodd-Frank Act. *Id.* This proposed rule is intended, in part, to provide such clarity.

As discussed earlier, section 1403 of the Dodd-Frank Act added new TILA section 129B(c). This new statutory provision builds on, but in some cases imposes new or different requirements than, the current Regulation Z provisions established by the Board's 2010 Loan Originator Final Rule. Under TILA section 129B(c)(1), for any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal). 12 U.S.C. 1639b(c)(1). Further, TILA section 129B(c)(4)(A) provides that nothing in section 129B(c) of TILA permits yield spread premiums or other similar compensation that would, for any residential mortgage loan, permit the total amount of direct and indirect compensation from all sources permitted to a mortgage originator to vary based on the terms of the loan (other than the amount of the principal). 12 U.S.C. 1639b(c)(4)(A).[51] The statute also provides that nothing in TILA section 129B(c) prohibits incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time. 12 U.S.C. 1639b(c)(4)(D).[52] The statute serves as an additional express base of authority for the Bureau to undertake this rulemaking.

Although the language in section 1403 of the Dodd-Frank Act amending TILA and addressing mortgage originator compensation that varies based on terms of the transaction generally mirrors the current regulatory text and commentary of § 1026.36(d)(1), the statutory and regulatory provisions differ in several respects. First, unlike § 1026.36(d)(1)(iii), the statute does not contain an exception to the general prohibition on compensation varying based on loan terms for transactions where the mortgage originator receives compensation directly from the consumer. Second, while § 1026.36(d)(1) prohibits compensation that is based on a transaction's ''terms or conditions,'' TILA section 129B(c)(1) refers only to compensation that varies based on ''terms.'' Finally, § 1026.36(d)(1)(i) provides that the loan originator may not receive and no person shall pay compensation in an amount ''that is based on'' any of the transaction's terms or conditions, whereas TILA section 129B(c)(1) prohibits compensation that ''varies based on'' the terms of the loan.[53]

In view of the differences in the statutory and regulatory provisions prohibiting loan originator compensation based on transaction terms and the interpretive questions that have arisen with regard to the current regulations noted above, the Bureau is proposing revisions to § 1026.36(d)(1) and its commentary to harmonize the regulatory provisions with the language added to TILA by the Dodd-Frank Act. Moreover, the Bureau is proposing certain revisions to § 1026.36(d)(1) and its commentary to address the interpretive issues that have arisen under the current regulations.

36(d)(1)(i)

Terms or Conditions

As noted previously, § 1026.36(d)(1)(i) provides that, in connection with a consumer credit transaction secured by a dwelling, ''no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions.'' The Dodd-Frank Act section 1403 amendments, which added TILA section 129B(c), limits restrictions on mortgage originator compensation to ''terms of the loan'' only. Current § 1026.36(d)(1)(i) and commentary provide that a loan originator may not receive and no person may pay to a loan originator compensation that is based on any of the ''transaction's terms or conditions.''

The Bureau proposes to retain the word ''transaction,'' rather than use the statutory term ''loan,'' to preserve consistency within Regulation Z. The Bureau makes this proposal pursuant to its authority under TILA section 105(a) to prescribe regulations that provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau believes that ''transaction'' and ''loan,'' as that term is used in TILA section 129B(c), have consistent meanings and, therefore, that preserving the use of ''transaction'' in § 1026.36(d)(1)(i) will facilitate compliance for creditors by avoiding the need to contend with a distinct, but duplicative, defined term.

On the other hand, the Bureau proposes to revise the phrase ''terms or conditions'' to delete the word

[50] U.S. Consumer Fin. Prot. Bureau, CFPB Bull. No. 2012–2, *Payments to Loan Originators Based on Mortgage Transaction Terms or Conditions under Regulation Z* (Apr. 2, 2012), available at: *http://files.consumerfinance.gov/f/201204_cfpb_LoanOriginatorCompensationBulletin.pdf.*

[51] TILA section 129B(c)(4) also states that nothing in TILA section 129B(c) shall be deemed to limit or affect the amount of compensation received by a creditor upon the sale of a consummated loan to a subsequent purchaser. 12 U.S.C. 1639b(c)(4)(B). Moreover, a consumer is not restricted from financing at his or her option, including through principal or rate, any origination fees or costs permitted under TILA section 129B(c)(4), and a mortgage originator may receive such fees or costs, including compensation (subject to other provisions of TILA section 129B(c)), so long as such fees or costs do not vary based on the terms of the loan (other than the amount of the principal) or the consumer's decision as to whether to finance the fees or costs. 12 U.S.C. 1639b(c)(4)(C).

[52] Comment 36(d)(1)–3 already clarifies that the loan originator's overall loan volume delivered to the creditor is an example of permissible compensation for purposes of the regulation.

[53] The latter two differences are discussed in the section-by-section analysis of proposed § 1026.36(a), above.

''conditions'' for § 1026.36(d)(1)(i) where applicable in both the regulatory text and commentary. The Bureau is also proposing conforming amendments to § 1026.36(d)(1)(ii). The Bureau believes that removal of the term ''conditions'' from ''transaction terms or conditions'' clarifies § 1026.36(d)(1) but does not materially amend the provision's scope. The Bureau also proposes to revise the discussion about proxies, discussed in more detail below, to aid in determining whether a factor is a proxy for a transaction's terms.

Varies Based On

TILA section 129B(c)(1) prohibits a mortgage originator from receiving, and any person from paying a mortgage originator, ''compensation that *varies* based on'' the terms of the loan (emphasis added). The prohibition in current § 1026.36(d)(1) is on ''compensation in an amount that *is based on*'' the transaction's terms and conditions (emphasis added). The Bureau believes the meaning of the statute's reference to compensation that ''varies'' based on loan terms is already embodied in § 1026.36(d)(1). Thus, the Bureau does not propose to revise § 1026.36(d)(1) to include the word ''varies.''

The Bureau believes that compensation to loan originators violates the prohibition if the amount of the compensation is based on the terms of the transaction (that is, a violation does not require a showing of any person's subjective intent to relate the amount of the payment to a particular loan term). Proposed new comment 36(d)(1)–1.i clarifies these points. The Bureau is proposing new comment 36(d)(1)–1 in place of existing comment 36(d)(1)–1, which is being moved to comment 36(a)–5, as discussed above.

The proposed comment also clarifies that a difference between the amount of compensation paid and the amount that would have been paid for different terms might be shown by a comparison of different transactions with different terms made by the same loan originator, but a violation does not require a comparison of multiple transactions.

Proxy for Loan Terms

The Bureau also proposes revisions to § 1026.36(d)(1) and comment 36(d)(1)–2 to provide guidance for determining whether a factor is a proxy for a transaction's term and also provide examples. As stated above, § 1026.36(d)(1)(i) provides that, in connection with a consumer credit transaction secured by a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions. Existing comment 36(d)(1)–2 further elaborates on the prohibition by stating:

> The rule also prohibits compensation based on a factor that is a proxy for a transaction's terms or conditions. For example, a consumer's credit score or similar representation of credit risk, such as the consumer's debt-to-income ratio, is not one of the transaction's terms or conditions. However, if a loan originator's compensation varies in whole or in part with a factor that serves as a proxy for loan terms or conditions, then the originator's compensation is based on a transaction's terms or conditions.

The existing comment also illustrates the guidance by providing an example of payments based on credit score that would violate § 1026.36(d)(1).

Since the Board's 2010 Loan Originator Final Rule was promulgated, the Board and the Bureau have received numerous inquiries on whether particular loan originator payment structures are based on factors that are proxies for loan terms. Small Entity Representatives (SERs) on the Small Business Review Panel also urged the Bureau to use this rulemaking to clarify when a factor used to determine compensation for a loan originator is a proxy for a loan term. The Bureau does not believe that any departure from the approach to proxies in current comment 36(d)(1)–2 is necessitated by the Dodd-Frank Act. The Bureau also believes that current § 1026.36(d)(1)(i) prohibits compensation based on a factor that is a proxy for a transaction's terms. However, the Bureau understands there has been considerable uncertainty on this issue and proposes clarifications in § 1026.36(d)(1)(i) and comment 36(d)(1)–2.i to help creditors and loan originators determine whether a factor on which compensation would be based is a proxy for a transaction's terms.

The proposal clarifies in § 1026.36(d)(1)(i), rather than commentary only, that compensation based on a proxy for a transaction's terms is prohibited. The proposed clarification in § 1026.36(d)(1)(i) and comment 36(d)(1)–2.i also provides that a factor (that is not itself a term of a transaction originated by the loan originator) is a proxy for the transaction's terms if: (i) The factor substantially correlates with a term or terms of the transaction and (ii) the loan originator can, directly or indirectly, add, drop, or change the factor when originating the transaction.[54]

Both conditions must be satisfied for a factor to be considered a proxy for a transaction's terms. If a factor does not ''substantially'' correlate with a term of a transaction originated by the loan originator, the factor is not a proxy for a transaction's terms. The Bureau proposes to use the term ''substantially'' but invites comment on whether this term is sufficiently clear and, if not, what other terms should be considered. The Bureau also seeks comment on how correlation to a term should be determined.

If the factor does substantially correlate with a term of a transaction originated by the loan originator, then the factor must be analyzed under the second condition, whether the loan originator can, directly or indirectly, add, drop, or change the factor when originating the transaction. The Bureau believes that, where a loan originator has no or minimal ability directly or indirectly to add, drop, or change a factor, that factor cannot be a proxy for the transaction's terms because such a factor cannot be the basis for incentives to steer consumers inappropriately. For example, loan originators cannot change a property's location, thus property location cannot be a proxy for a transaction's terms. Arguably, a loan originator could indirectly change the property location by steering a consumer to choose a property in a particular location. However, the ability for loan originators to steer consumers to a particular property location with such frequency to serve as an incentive for steering consumers is minimal. In proposed comment 36(d)(1)–2.i, the Bureau provides three new examples to illustrate use of the proposed proxy standard and to facilitate compliance with the rule.

The Bureau also proposes to delete the current proxy example in the comment that identifies credit scores as a proxy for a transaction's terms. The Bureau believes the current credit score proxy example is confusing and created uncertainty for creditors and loan originators depending on their

[54] The Bureau specifically sought input during the Small Business Review Panel process on clarifying the rule's application to proxies. The proxy proposal under consideration presented to the SERs during the Small Business Review Panel process stated that ''a factor is a proxy if: (1) It substantially correlates with a loan term; and (2) the MLO has discretion to use the factor to present a loan to the consumer with more costly or less advantageous term(s) than term(s) of another loan available through the MLO for which the consumer likely qualifies.'' After further consideration, the Bureau believes the proxy proposal contained in this proposed rule would be easier to apply uniformly and would better addresses cases where the loan originator does not ''use'' the factor than the specific proposal presented to the Small Business Review Panel. The Bureau, however, welcomes comment on how best to address proxies.

particular facts and circumstances. Moreover, under the guidance discussed above, a credit score may or may not be a proxy for a transaction's terms, depending on the facts and circumstances; it is not automatically a proxy, as many creditors and loan originators have inferred from the existing comment's example.

The Bureau proposes to add comment 36(d)(1)–2.i.A which provides an example of compensation based on a loan originator's employment tenure. This factor likely has little (if any) correlation to loan terms. This example illustrates how, if a factor that compensation is based on has little to no correlation to a transaction's term or terms, it is not a proxy for a transaction's terms.

Proposed comment 36(d)(1)–2.i.B provides an example illustrating how a loan originator's compensation varies based on whether a loan is held in portfolio or sold into the secondary market. In this case, the example assumes a loan is held in portfolio or sold into the secondary market depending in large part on whether the loan is a five-year balloon loan or a thirty-year loan. Thus, whether a loan is held in portfolio or sold into the secondary market substantially correlates with the transaction's terms. The loan originator in the example may be able to change the factor indirectly by steering the consumer to choose the five-year loan or the thirty-year loan. Thus, whether a loan is held in portfolio or sold into the secondary market is a proxy for a transaction's terms under these particular facts and circumstances.

Proposed comment 36(d)(1)–2.i.C illustrates an example where compensation is based on the geographic location of the property securing a refinancing. The loan originator is paid a higher commission for refinancings secured by property in State A than in State B. Even if refinancings secured by property in State A have lower interest rates than loans secured by property in State B, the property's location substantially correlates with loan terms. However, the loan originator cannot change the presence or absence of the factor (*i.e.,* whether the refinancing is secured by property in State A or State B). Thus, geographic location, under these particular facts and circumstances, would not be considered a proxy for a transaction's terms.

Other proposed revisions to comment 36(d)(1)–2 include clarifying that the rule does not prohibit compensating loan originators differently on different transactions, provided such differences in compensation are not based on a transaction's terms or a proxy for a transaction's terms. The Bureau also proposes to delete ''conditions'' from the comment where applicable and the existing guidance that the loan-to-value ratio is not a term of the transaction to conform to the proposed amendment discussed above concerning the prohibition on compensation based on the transaction's ''terms.''

The Bureau believes that the proposed changes and the addition of new commentary should reduce uncertainty and help simplify application of the prohibition on compensation based on the transaction's terms. The Bureau has learned through outreach, however, that a number of creditors pay loan originators the same commission regardless of loan product or type. Many of these institutions have expressed concerns about revising the proxy guidance. They argue that unscrupulous loan originators will attempt to use any specific proxy guidance to justify compensation schemes that violate the principles of the rule. The Bureau therefore solicits comment on the proposal, alternatives the Bureau should consider, or whether any action to revise the proxy concept and analysis is helpful and appropriate.

Pooled Compensation

Comment 36(d)(1)–2 provides examples of compensation that is based on transaction terms or conditions. Mortgage creditors and others have raised questions about whether loan originators that are compensated differently and originate loans with different terms are prohibited under § 1026.36(d)(1) from pooling their compensation and sharing in that compensation pool. For example, assume that Loan Originator A receives a commission of two percent of the loan amount for each loan that he or she originates and originates loans that generally have higher interest rates than the loans that Loan Originator B originates. In addition, assume Loan Originator B receives a commission of one percent of the loan amount for each loan that he or she originates and originates loans that generally have lower interest rates than the loans originated by Loan Originator A. The Bureau proposes to revise comment 36(d)(1)–2 to make clear that, where loan originators are compensated differently and they each originate loans with different terms, § 1026.36(d)(1) does not permit the pooling of compensation so that the loan originators share in that pooled compensation. In this example, proposed comment 36(d)(1)–2.ii clarifies that the compensation of the two loan originators may not be pooled so that the loan originators share in that pooled compensation. The Bureau believes that this type of pooling is prohibited by § 1026.36(d)(1) because each loan originator is being paid based on loan terms, with each loan originator receiving compensation based on the terms of the loans made by the loan originators collectively. This type of pooling arrangement could provide an incentive for the loan originators participating in the pooling arrangement to steer some consumers to loan originators that originate loan with less favorable terms (for example, that have a higher interest rate), to maximize their compensation.

Creditor's Ability to Offer Certain Loan Terms

Comment 36(d)(1)–4 clarifies that § 1026.36(d)(1) does not limit the creditor's ability to offer certain loan terms. Specifically, comment 36(d)(1)–4 makes clear that § 1026.36(d)(1) does not limit a creditor's ability to offer a higher interest rate as a means for the consumer to finance the payment of the loan originator's compensation or other costs that the consumer would otherwise pay (for example, in cash or by increasing the loan amount to finance such costs). Thus, a creditor is not prohibited by § 1026.36(d)(1) from charging a higher interest rate to a consumer who will pay some or none of the costs of the transaction directly, or offering the consumer a lower rate if the consumer pays more of the costs directly. For example, a creditor may charge an interest rate of 6.0 percent where the consumer pays some or all of the transaction costs but may charge an interest rate of 6.5 percent where the consumer pays none of those costs (subject to the requirements of proposed § 1026.36(d)(2)(ii), discussed below). Section 1026.36(d)(1) also does not limit a creditor from offering or providing different loan terms to the consumer based on the creditor's assessment of credit and other risks (such as where the creditor uses risk-based pricing to set the interest rate for consumers). Finally, a creditor is not prohibited under § 1026.36(d)(1) from charging consumers interest rates that include an interest rate premium to recoup the loan originator's compensation through increased interest paid by the consumer (such as by adding a 0.25 percentage point to the interest rate on each loan). This guidance recognizes that creditors that pay a loan originator's compensation generally recoup that cost through a higher interest rate charged to the consumer.

As discussed in the section-by-section analysis to proposed § 1026.36(d)(2)(ii), for transactions subject to proposed § 1026.36(d)(2)(ii), a creditor, a loan originator organization, or affiliates of either may not impose on the consumer any discount points and origination points or fees unless the creditor complies with § 1026.36(d)(2)(ii)(A). As discussed below, proposed § 1026.36(d)(2)(ii)(A) requires, as a prerequisite to a creditor, loan originator organization, or affiliates of either imposing any discount points and origination points or fees on a consumer in a transaction, that the creditor also make available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. Because of these restrictions in proposed § 1026.36(d)(2)(ii), the Bureau proposes to revise comment 36(d)(1)–4 to clarify that charging different interest rates, such as in accordance with risk-based pricing policies, relates only to § 1026.36(d)(1) and is not intended to override the restrictions in proposed § 1026.36(d)(2)(ii).

Point Banks

Based on numerous inquiries received, the Bureau considered proposing commentary language addressing whether there are any circumstances under which point banks are permissible under § 1026.36(d). The Bureau received and considered the views of SERs participating in the Small Business Review Panel process as well as the views expressed by other stakeholders during outreach. Based on those views and the Bureau's own considerations, the Bureau believes that there are no circumstances under which point banks are permissible, and they therefore continue to be prohibited.

Point banks operate as follows: Each time a loan originator closes a transaction, the creditor contributes some agreed upon, small percentage of that transaction's principal amount (for example, 0.15 percent, or 15 ''basis points'') into the loan originator's point bank account. This account is not actually a deposit account with the creditor or any depository institution but is only a continuously maintained accounting balance of basis points credited for originations and amounts debited when ''spent'' by the loan originator. The loan originator may spend any amount up to the current balance in the point bank to obtain pricing concessions from the creditor on the consumer's behalf for any transaction. For example, the loan originator may pay discount points to the creditor from the loan originator's point bank to obtain a lower rate for the consumer.

Payments to point banks serve as a form of loan originator compensation because they enable additional transactions to be consummated and loan originators to receive compensation on these transactions. Accordingly, they are a financial incentive to the loan originator and, therefore, compensation as proposed § 1026.36(a)(3) defines that term. To the extent such payments are based on the transaction's terms or a factor that operates as a proxy for the transaction's terms, they violate § 1026.36(d)(1) directly. Even if the contribution to a loan originator's point bank for a given transaction is not based on the transaction's terms (or a proxy therefor), the loan originator's subsequent spending of amounts from the point bank on other transactions violates § 1026.36(d)(1) as an impermissible pricing concession pursuant to comment 36(d)(1)–5, discussed below. The Bureau believes that even a point bank whose funds are reserved for use in the unique circumstances described in proposed new comment 36(d)(1)–7 where pricing concessions would be permitted, discussed below, cannot be legitimate because the criteria set forth in comment 36(d)(1)–7 limit such concessions to unusual and infrequent cases of unforeseen increases in closing costs; by definition, a point bank contemplates routine use, which is contrary to the premises of comment 36(d)(1)–7.

The Bureau's decision not to propose to allow point banks was also informed by the uniformly negative view of SERs participating in the Small Business Review Panel process and negative views expressed by many other stakeholders in further outreach. The SERs listed a number of concerns, including the risk that points bank would create incentives for loan originators to upcharge some consumers to create flexibility for themselves to provide concessions to other consumers; the possibility that point banks would permit loan officers to treat consumers differently, which could lead to fair lending concerns; and the prospect of mortgage brokers steering consumers to the lender that provided them with the greatest point bank contributions. For the reasons stated above, the Bureau is not proposing to provide guidance describing circumstances under which point banks are permissible under § 1026.36(d).

Pricing Concessions

The Bureau proposes two revisions to the § 1026.36(d)(1) commentary addressing loan originator pricing concessions. Comment 36(d)(1)–5 discusses the effect of modifying loan terms on loan originator compensation. The existing comment provides that a creditor and loan originator may not agree to set the originator's compensation at a certain level and then subsequently lower it in selective cases (such as where the consumer is offered a reduced rate to meet a quote from another creditor), *i.e.,* the compensation is not subject to change (increase or decrease) based on whether different loan terms are negotiated. The Bureau is proposing a revision to this comment. The revised comment provides that, while the creditor may change loan terms or pricing, for example to match a competitor, avoid triggering high-cost loan provisions, or for other reasons, the loan originator's compensation on that transaction may not be changed. Thus, the revised comment clarifies that a loan originator may not agree to reduce its compensation or provide a credit to the consumer to pay a portion of the consumer's closing costs, for example, to avoid high-cost loan provisions. The revised comment also includes a cross-reference to comment 36(d)(1)–7 for further guidance.

The Bureau proposes to delete existing comment 36(d)(1)–7, which clarifies that the prohibition in § 1026.36(d)(1) does not apply to transactions in which any loan originator receives compensation directly from the consumer (*i.e.,* ''consumer-paid transactions''). Like the language in current § 1026.36(d)(1)(iii) (discussed later in this section-by-section analysis), this comment has been superseded by the Dodd-Frank Act, which applies the prohibition on compensation based on transaction terms to consumer-paid transactions.

In its place, the Bureau proposes to include a new comment 36(d)(1)–7 addressing a discrete issue related to pricing concessions. The proposed comment provides that, notwithstanding comment 36(d)(1)–5, § 1026.36(d)(1) does not prohibit loan originators from decreasing their compensation to cover unanticipated increases in non-affiliated third-party closing costs that result in the actual amounts of such closing costs exceeding limits imposed by applicable law (*e.g.,* tolerance violations under Regulation X). This interpretation of § 1026.36(d)(1) does not apply if the creditor or the loan originator knows or should reasonably be expected to know the amount of any

third-party closing costs in advance. Proposed comment 36(d)(1)–7 explains, by way of example, that a loan originator is reasonably expected to know the amount of the third-party closing costs in advance if the loan originator allows the consumer to choose from among only three pre-approved third-party service providers.

The Bureau believes that such concessions, when made in response to unforeseen events outside the loan originator's control to comply with otherwise applicable legal requirements, do not raise concerns about the potential for steering consumers to different loan terms. That is, if the excess closing cost is truly unanticipated and results in the loan originator having to take less compensation to cure the violation of applicable law, no steering issues are present because the loan originator's compensation is being decreased after-the-fact. Thus, a loan originator's reduced compensation in such cases is not in fact based on the transaction's terms and does not violate § 1026.36(d)(1). This further clarification effectuates the purposes of, and facilitates compliance with, TILA section 129B(c)(1) and § 1026.36(d)(1)(i) because, without it, creditors and loan originators might incorrectly conclude that such concessions being borne by a loan originator would violate those provisions, or they could face unnecessary uncertainty with regard to compliance with these provisions and other laws, such as Regulation X's tolerance requirements.

Under the proposed comment, a loan originator cannot make a pricing concession where the loan originator knows or reasonably is expected to know the amount of the third-party closing costs in advance. If a loan originator makes repeated pricing concessions for the same categories of closing costs across multiple transactions, based on a series of purportedly unanticipated expenses, the Bureau believes proposed comment 36(d)(1)–7 does not apply because the loan originator is reasonably expected to know the closing costs across multiple transactions. In that instance, the pricing concessions would raise the same concerns that resulted in the guidance under current comment 36(d)(1)–5 that pricing concessions are not permissible under § 1026.36(d)(1)(i) (*i.e.,* because loan originators could knowingly overestimate the closing costs and then selectively reduce the closing costs as a concession).

The Bureau solicits comment on whether this interpretation is appropriate, too narrow, or creates a risk of undermining the principal prohibition of compensation based on a transaction's terms.

Compensation Based on Terms of Multiple Transactions by an Individual Loan Originator

Section 1026.36(d)(1)(i) prohibits payment of an individual loan originator's compensation that is directly or indirectly based on the terms of ''the transaction.'' The Bureau believes that ''transaction'' necessarily includes multiple transactions by a single individual loan originator because the payment of compensation is not always tied to a single transaction. Current comment 36(d)(1)–3 lists several examples of compensation methods not based on transaction terms that take into account multiple transactions, including compensation based on overall loan volume and the long-term performance of the individual loan originator's loans. Moreover, multiple transactions by definition comprise the individual transactions. Thus, the Bureau believes that the singular word ''transaction'' in § 1026.36(d)(1)(i) includes multiple transactions by a single individual loan originator. To avoid any possible uncertainty, however, the Bureau proposes to clarify, as part of proposed comment 36(d)(1)–1.ii, that § 1026.36(d)(1)(i) prohibits compensation based on the terms of multiple transactions by an individual loan originator.

Compensation Based on Terms of Multiple Individual Loan Originators' Transactions

As noted above, current § 1026.36(d)(1)(i) prohibits payment of an individual loan originator's compensation that is ''directly or indirectly'' based on the terms of ''the transaction,'' and TILA (as amended by the Dodd-Frank Act) similarly prohibits compensation that ''directly or indirectly'' varies based on the terms of ''the loan.'' However, the current regulation and its commentary do not expressly address whether a person may pay compensation by considering the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators employed by the person during the time period for which the compensation is being paid. Compensation in the form of a bonus, for example, may be based indirectly on the terms of multiple individual loan originators' transactions. For example, assume that a creditor employs six individual loan originators and offers loans at a minimum rate of 6.0 percent and a maximum rate of 8.0 percent (unrelated to risk-based pricing). Assuming relatively constant loan volume and amounts of credit extended and relatively static market rates, if the six individual loan originators' aggregate transactions in a given calendar year average a rate of 7.5 percent rather than 7.0 percent, creating a higher interest rate spread over the creditor's minimum acceptable rate of 6.0 percent, the creditor will generate higher amounts of interest revenue if the loans are held in portfolio and increased proceeds from secondary market purchasers if the loans are sold. Assume that the increased revenues lead to higher profits for the creditor (*i.e.,* expenses do not increase so as to negate the effect of higher revenues). If the creditor pays a bonus to an individual loan originator out of a bonus pool established with reference to the creditor's profitability that, all other factors being equal, is higher than it would have been if the average rate of the six individual loan originators' transactions was 7.0 percent, then the bonus is indirectly related to the terms of multiple transactions of multiple loan originators.

Because neither TILA (as amended by the Dodd-Frank Act) nor the current regulations expressly addresses the payment of compensation that is based on the terms of multiple loan originators' transactions, numerous questions have been posed regarding the applicability of the current regulation to qualified plans and profit-sharing and retirement plans that are not qualified plans. In CFPB Bulletin 2012–2, the Bureau stated that it was permissible to pay contributions to qualified plans if the contributions to the qualified plans are derived from profits generated by mortgage loan originations but did not address how the rules applied to non-qualified plans. CFPB Bulletin 2012–2 stated further that guidance on the payment of compensation out of profits generated by mortgage loan originations would be forthcoming. The proposed rule reflects the Bureau's views on this issue.

The Bureau believes that compensation that directly or indirectly is based on the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators poses the same fundamental problems that the Dodd-Frank Act and the current regulation address with regard to the individual loan originator's transactions. A profit-sharing plan, bonus pool, or profit pool set aside out of a portion of a creditor or loan originator organization's profits, from which bonuses are paid or contributions to qualified or non-qualified plans are

made, may readily and directly reflect transaction terms of multiple individual loan originators taken in the aggregate. As a result, this type of compensation creates potential incentives for individual loan originators to steer consumers to different loan terms.

In view of such matters, the framing of compensation restrictions in current § 1026.36(d)(1)(i) in terms of ''the transaction'' permits an interpretation that could undermine the purpose of the rule. The prohibition in current § 1026.36(d)(1)(i) means that a creditor or loan originator organization cannot differentially distribute compensation among individual loan originators based on each individual loan originator's transaction terms. Because the current regulation does not expressly address compensation based on the terms of multiple individual loan originators' transactions, however, creditors and loan originator organizations could establish compensation policies that evade the intent of § 1026.36(d)(1)(i). For example, creditors and loan originator organizations could restructure their compensation policies to pay a higher percentage of the individual loan originator's compensation through bonuses under profit-sharing plans rather than through salary, commissions, or other forms of compensation that are not based on aggregate transaction terms of multiple individual loan originators.

Through outreach with creditors and loan originator organizations, the Bureau is aware that their bonus structures take a multitude of forms, including payment of so-called ''top-down'' and ''bottom-up'' bonuses. In a top-down process, management determines the size of a bonus pool for the firm as a whole at or near the end of the performance year, splits the bonus pool into sub-pools for each line of business, and then allocates the sub-pools to individual employees in a manner related to their individual performance. In contrast, a bottom-up bonus is paid following the firm's assessment of each employee's performance and assignment of an incentive compensation award, with the firm's total amount of incentive compensation for the year being the sum of the individual incentive compensation awards. For many large banks, the processes are a mixture of top-down and bottom-up, but the emphasis can differ markedly.[55] Although the potential incentive for steering consumers to different loan terms is clearly present with top-down bonuses, where an actual profit pool is set up, steering incentives exist with regard to bottom-up bonuses as well. This is because the profitability of the company could be one of several factors taken into account in awarding a bonus package for an individual loan originator, making it clear to the individual loan originators that the employers are basing the amount of any bonuses paid on a factor (profits) which is substantially correlated to the terms of multiple transactions. Moreover, the Bureau understands that many companies utilize a mix of bottom-up and top-down bonuses, so drawing a distinction between top-down and bottom-up bonuses for regulatory purposes may be artificial and under-inclusive.

In light of the foregoing, the Bureau is proposing a new comment 36(d)(1)–1.ii to clarify that the prohibition on payment and receipt of compensation based on the transaction's terms under § 1026.36(d)(1)(i) covers compensation that directly or indirectly is based on the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators employed by the person. Proposed comment 36(d)(1)–1.ii also gives examples illustrating the application of this guidance. Proposed comment 36(d)(1)–2.iii.C provides further clarification on these issues. The Bureau believes this approach is necessary to implement the statutory provisions and is appropriate to address the potential incentives to steer consumers to different loan terms that are present with profit-sharing plans and to prevent circumvention or evasion of the statute.

The Bureau believes this proposed clarification sets a bright-line standard with regard to compensating individual loan originators through bonuses and contributions to qualified or non-qualified plans based on the terms of multiple loan transactions by multiple individual loan originators. As discussed below, the Bureau believes it is appropriate to create additional rules to take into account circumstances where any potential incentives are sufficiently attenuated to permit such compensation. Specifically, the Bureau's proposal would permit employer contributions made to qualified plans in which individual loan originators participate, pursuant to § 1026.36(d)(1)(iii), discussed below. The proposal also would permit payment of bonuses under profit-sharing plans and contributions to non-qualified defined benefit and contribution plans even if the compensation is directly or indirectly based on the terms of multiple individual loan originators' transactions where: (1) The revenues of the mortgage business do not predominate with respect to the total revenues of the person or business unit to which the profit-sharing plan applies, as applicable (pursuant to proposed § 1026.36(d)(1)(iii)(B)(*1*)) or (2) the individual loan originator being compensated was the loan originator for a de minimis number of transactions (pursuant to proposed § 1026.36(d)(1)(iii)(B)(*2*)). The section-by-section analysis of proposed § 1026.36(d)(1)(iii), below, discusses these additional provisions in more detail. In all instances, the compensation cannot take into account an individual loan originator's transaction terms, pursuant to § 1026.36(d)(1)(iii)(A). Because the Bureau is proposing to permit compensation based on multiple individual loan originators' terms in certain circumstances under proposed § 1026.36(d)(1)(iii), the Bureau is proposing to revise § 1026.36(d)(1)(i) to include the language ''Except as provided in [§ 1026.36(d)(1)(iii)]'' to emphasize that the compensation restrictions in § 1026.36(d)(1)(i) are subject to the provisions in proposed § 1026.36(d)(1)(iii).

The Bureau recognizes that the potential incentives to steer consumers to different loan terms that are inherent in profit-sharing plans may vary based on many factors, including the organizational structure, size, diversity of business lines, and compensation arrangements. In certain circumstances, a particular combination of factors may substantially mitigate the potential steering incentives arising from profit-sharing plans. For example, the incentive of individual loan originators to upcharge likely diminishes as the total number of individual loan originators contributing to the profit pool increases. That is, the incentives may be mitigated because: (1) Each individual loan originator's efforts will have increasingly less impact on compensation paid under profit-sharing plans; and (2) the ability of an individual loan originator to coordinate efforts with the other individual loan originators will decrease.[56] This may be

[55] *See* Bd. of Governors of the Fed. Reserve Sys., *Incentive Compensation Practices: A Report on the Horizontal Review of Practices at Large Banking Organizations* 15 (2011), available at: *http://www.federalreserve.gov/publications/other-reports/incentive-compensation-report-201110.htm* (discussing bottom-up and top-down bonus structures).

[56] This ''free-riding'' behavior has long been observed by economists. *See, e.g.,* Martin L.Weitzman. Incentive Effects of Profit Sharing (1980); Robert M. Axelrod, The Evolution of

particularly true for large depository institution creditors or large non-depository loan originator organizations that employ many individual loan originators.[57] In such a large organization, moreover, the nexus between the terms of the transactions of the multiple individual loan originators, the revenues of the organization, the profits of the organization, and the compensation decisions may be more diffuse. The Bureau thus solicits comment on the scope of the steering incentive problem presented by profit-sharing plans, whether the proposal effectively addresses these issues, and whether a different approach would better address these issues.

The Bureau is further cognizant of the burdens that restrictions on compensation may impose on creditors, loan originator organizations, and individual loan originators. The Bureau believes that, when paid for legitimate reasons, bonuses and contributions to defined contribution and benefit plans can be useful and important inducements for individual loan originators to perform well. Profit-sharing plans, moreover, are a means for individual loan originators to become invested in the success of the organization as a whole. The Bureau solicits comment on whether the proposed restrictions on bonuses and other compensation paid under profit-sharing plans and contributions to defined contribution and benefit plans accomplish the Bureau's objectives without unduly restricting compensation approaches that address legitimate business needs.

Current comment 36(d)(1)–1 [58] provides guidance on what constitutes compensation and refers to salaries, commissions and similar payments. The Bureau is not proposing any clarifications to this existing guidance. In general, salary and commission amounts are more likely than bonuses to be set in advance. Salaries, unlike bonuses, are typically paid out of budgeted operating expenses rather than a ''profit pool.'' Commissions typically are paid for individual transactions and without reference to the person's profitability. Thus, payment of fixed percentage or fixed dollar amount commissions typically does not raise the potential issue of individual loan originators steering consumers to different loan terms. Also, the amounts of the individual loan originator's salary and commission often are stipulated by an employment contract, commission agreement, or similar agreement, the terms of which the employer agrees to satisfy so long as the employee meets the conditions set forth in the agreement or other employment performance requirements. The Bureau seeks comment on whether the prohibition on compensation relating to aggregate transaction terms of multiple individual loan originators should encompass a broader array of compensation methods, including, *e.g.,* salaries and commissions.

36(d)(1)(ii)

Amount of Credit Extended

As discussed above, § 1026.36(d)(1)(i) provides that a loan originator may not receive and a person may not pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions. Section 1026.36(d)(1)(ii) provides that the amount of credit extended is not deemed to be a transaction term or condition, provided compensation is based on a fixed percentage of the amount of credit extended. Such compensation may be subject to a minimum or maximum dollar amount.

Use of the term ''amount of credit extended.'' TILA section 129B(c)(1), which was added by section 1403 of the Dodd-Frank Act, provides that a mortgage originator may not receive (and no person may pay to a mortgage originator), directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of principal). 12 U.S.C. 1639b(c)(1). Thus, TILA section 129B(c)(1) permits mortgage originators to receive (and a person to pay mortgage originators) compensation that varies based on the ''amount of the principal'' of the loan. Section 1026.36(d)(1)(ii) currently uses the phrase ''amount of credit extended'' instead of the phrase ''amount of the principal'' as set forth in TILA section 129B(c)(1). Those phrases, however, typically are used to describe the same amount and generally have the same meaning. The term ''principal,'' in certain contexts, sometimes may mean only the portion of the total credit extended that is applied to the consumer's primary purpose, such as purchasing the home or paying off the existing balance in the case of a refinancing. When used in this sense, the ''amount of the principal'' might represent only a portion of the amount of credit extended, for example where the consumer also borrows additional amounts to cover transaction costs. The Bureau does not believe that Congress intended ''amount of the principal'' in this narrower, less common way, however, because the exception appears intended to accommodate existing industry practices, under which loan originators generally are compensated based on the total amount of credit extended without regard to the purposes to which any portions of that amount may be applied.

For the foregoing reasons, pursuant to its authority under TILA section 105(a) to facilitate compliance with TILA, the Bureau proposes to retain the phrase ''amount of credit extended'' in § 1026.36(d)(1)(ii) instead of replacing it with the statutory phrase ''amount of the principal.'' The Bureau believes that using the same phrase that is in the current regulatory language will ease compliance burden without diminishing the consumer protection afforded by § 1026.36(d) in any foreseeable way. Creditors already have developed familiarity with the term ''amount of credit extended'' in complying with the current regulation. The Bureau solicits comment on these beliefs and this proposal to keep the existing regulatory language in place.

Fixed percentage with minimum and maximum dollar amounts. Section 1026.36(d)(1)(ii) provides that loan originator compensation paid as a fixed percentage of the amount of credit extended may be subject to a minimum

Cooperation (1984); Oliver Hart & Bengt Holmstrom, *The Theory of Contracts,* in Advanced Economic Theory (T. Bewley ed., 1987); Douglas L. Kruse, *Profit Sharing and Employment Variability: Microeconomic Evidence on Weizman Theory,* 44 Indus. and Lab. Rel. Rev., 437 (1991); Haig R. Nalbantian, *Incentive Compensation in Perspective,* in Incentive Compensation and Risk Sharing (Haig R. Nalbantian ed., 1987); and Roy Radner, *The Internal Organization of Large Firms,* 96 Econ. J. 1 (1986). Quantifying these trade-offs has been difficult for practical applications, however. *See* Sumit Agarwal & Itzhak Ben-David, *Do Loan Officers' Incentives Lead to Lax Lending Standards?* (Fisher Coll. of Bus. Working Paper No. 2012–03–007, 2012); Stefan Grosse, Louis Putterman & Bettina Rockenbach, *Monitoring in Teams,* 9 J. Eur. Econ. Ass'n. 785 (2011); and Claude Meidenger, Jean-Louis Rulliere & Marie-Claire Villeval, *Does Team-Based Compensation Give Rise to Problems when Agents Vary in Their Ability?* (GATE Groupe, Working Paper No. W.P. 01–13, 2001).

[57] The Bureau notes that incentive compensation practices at large depository institutions were the subject of final guidance issued in 2010 by the Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. 75 FR 36395 (Jun. 17, 2010) (the Interagency Guidance). The Interagency Guidance was issued to help ensure that incentive compensation policies at large depository institutions do not encourage imprudent risk-taking and are consistent with the safety and soundness of the institutions. *Id.* The Bureau's proposed rule does not affect the Interagency Guidance on loan origination compensation. In addition, to the extent a person is subject to both the Bureau's rulemaking and the Interagency Guidance, compliance with Bureau's rulemaking is not deemed to be compliance with the Interagency Guidance.

[58] As discussed in the section-by-section analysis of § 1026.36(a), the Bureau is proposing to move the text of this comment to proposed comment 36(a)–5.

or maximum dollar amount. On the other hand, TILA section 129B(c)(1), as added by section 1403 of the Dodd-Frank Act, permits mortgage originators to receive (and a person to pay the mortgage originator) compensation that varies based on the ''amount of the principal'' of the loan, without addressing the question of whether such compensation may be subject to minimum or maximum limits. 12 U.S.C. 1639b(c)(1). Pursuant to its authority under TILA section 105(a) to facilitate compliance with TILA, the Bureau proposes to retain the current restrictions in § 1026.36(d)(1)(ii) on when loan originators are permitted to receive (and when persons are permitted to pay loan originators) compensation that is based on the amount of credit extended. Specifically, proposed § 1026.36(d)(1)(ii) continues to provide that the amount of credit extended is not deemed to be a transaction term, provided compensation received by or paid to a loan originator is based on a fixed percentage of the amount of credit extended; however, such compensation may be subject to a minimum or maximum dollar amount.

The Bureau believes that permitting creditors to set a minimum and maximum dollar amount is consistent with, and therefore furthers the purposes of, the statutory provision allowing compensation based on a percentage of the principal amount, consistent with TILA section 105(a). As noted above, the Bureau believes the purpose of excluding the principal amount from the ''terms'' on which compensation may not be based is to accommodate common industry practice. The Bureau also believes that, for some creditors, setting a maximum and minimum dollar amount also is common and appropriate because, without such limits, loan originators may be unwilling to originate very small loans and could receive unreasonably large commissions on very large loans. The Bureau therefore believes that, consistent with TILA section 105(a), permitting creditors to set minimum and maximum commission amounts may facilitate compliance and also may benefit consumers by ensuring that loan originators have sufficient incentives to originate particularly small loans.

In addition, comment 36(d)(1)–9 provides that § 1026.36(d)(1) does not prohibit an arrangement under which a loan originator is compensated based on a percentage of the amount of credit extended, provided the percentage is fixed and does not vary with the amount of credit extended. However, compensation that is based on a fixed percentage of the amount of credit extended may be subject to a minimum and/or maximum dollar amount, as long as the minimum and maximum dollar amounts do not vary with each credit transaction. For example, a creditor may offer a loan originator one percent of the amount of credit extended for all loans the originator arranges for the creditor, but not less than $1,000 or greater than $5,000 for each loan. On the other hand, as comment 36(d)(1)–9 clarifies, a creditor may not compensate a loan originator one percent of the amount of credit extended for loans of $300,000 or more, two percent of the amount of credit extended for loans between $200,000 and $300,000, and three percent of the amount of credit extended for loans of $200,000 or less. For the same reasons discussed above, consistent with TILA section 105(a), the Bureau believes this guidance is consistent with and furthers the statutory purposes and therefore proposes to retain it. To the extent a creditor seeks to avoid disincentives to originate small loans and unreasonably high compensation amounts on larger loans, the Bureau believes the ability to set minimum and maximum dollar amounts meets such goals.

Reverse mortgages. Industry representatives have asked what the phrase ''amount of credit extended'' means in the context of closed-end reverse mortgages. For closed-end reverse mortgages, a creditor typically calculates a ''maximum claim amount.'' Under the Federal Housing Administration's (FHA's) Home Equity Conversion Mortgage program, the ''maximum claim amount'' is the home value at origination (or applicable FHA loan limit, whichever is less). The creditor then calculates the maximum dollar amount the consumer is authorized to borrow (typically called the ''initial principal limit'') by multiplying the ''maximum claim amount'' by an applicable ''principal limit factor,'' which is calculated based on the age of the youngest borrower and the interest rate. The initial principal limit sets the maximum proceeds available to the consumer for the reverse mortgage. For closed-end reverse mortgages, a consumer often borrows the ''initial principal limit'' in a lump sum at closing. There can also be payments from the loan proceeds on behalf of the consumer such as to pay off existing tax liens.

Reverse mortgage creditors have requested guidance on whether the ''maximum claim amount'' or the ''initial principal limit'' is the ''amount of credit extended'' in the context of closed-end reverse mortgages. The Bureau believes that the ''initial principal limit'' most closely resembles the amount of credit extended on a traditional, ''forward'' mortgage. Thus, consistent with Dodd-Frank Act section 1403 and pursuant to its authority under TILA section 105(a) to facilitate compliance with TILA, the Bureau proposes to add comment 36(d)(1)–10 to provide that, for closed-end reverse mortgage loans, the ''amount of credit extended'' for purposes of § 1036.36(d)(1) means the maximum proceeds available to the consumer under the loan, which is the ''initial principal limit.''

36(d)(1)(iii)

Consumer Payments Based On Loan Terms

As discussed above, § 1026.36(d)(1)(i) currently provides that no loan originator may receive and no person may pay to a loan originator compensation based on any of the transaction's terms or conditions. Section 1026.36(d)(1)(iii), however, currently provides that the prohibition in § 1026.36(d)(1)(i) does not apply to transactions in which a loan originator received compensation directly from the consumer and no other person provides compensation to a loan originator in connection with that transaction. Thus, even though, in accordance with § 1026.36(d)(2), a loan originator organization that receives compensation from a consumer may not split that compensation with its individual loan originator, current § 1026.36(d)(1) does not prohibit a consumer's payment of compensation to the loan originator organization from being based on the transaction's terms or conditions.

TILA section 129B(c)(1), which was added by section 1403 of the Dodd-Frank Act, provides that mortgage originators may not receive (and no person may pay to mortgage originators), directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of principal). 12 U.S.C. 1639b(c)(1). Thus, TILA section 129B(c)(1) imposes a ban on compensation that varies based on loan terms even in transactions where the mortgage originator receives compensation directly from the consumer. For example, under the amendment, even if the only compensation that a loan originator receives comes directly from the consumer, that compensation may not vary based on the loan terms.

Consistent with TILA section 129B(c)(1), the Bureau proposes to delete existing § 1026.36(d)(1)(iii) and a related sentence in existing comment

36(d)(1)–7. Thus, transactions where a loan originator receives compensation directly from the consumer would no longer be exempt from the prohibition set forth in § 1026.36(d)(1)(i). As a result, whether the consumer or another person, such as a creditor, pays a loan originator compensation, that compensation may not be based on any of the transaction's terms. Comment 36(d)(1)–7 provides guidance on when payments to a loan originator are considered compensation received directly from the consumer. As discussed in more detail in the section-by-section analysis to proposed § 1026.36(d)(2)(i), the Bureau proposes to delete the first sentence of this comment and move the other content of this comment to new comment 36(d)(2)(i)–2.i.

Profit-Sharing and Related Plans

The Bureau proposes a new § 1026.36(d)(1)(iii), which permits in limited circumstances the payment of compensation that directly or indirectly is based on the terms of transactions subject to § 1026.36(d) of multiple individual loan originators.

Qualified plans. As noted above, following a number of inquiries about how the restrictions in the current regulation apply to qualified retirement and profit-sharing plans, the Bureau issued a Bulletin stating that bonuses and contributions to qualified plans out of loan origination profits were permissible under the current rules. The Bureau's position was based in part on certain structural and operational requirements that the Internal Revenue Code (IRC) imposes on qualified plans, including contribution and benefit limits, deferral requirements (regarding both access to and taxation of the funds contributed), the considerable tax penalties for non-compliance, non-discrimination provisions, and requirements to allocate among plan participants based on a definite formula.[59] Employers also may receive tax deductions for contributions to defined contribution plans up to defined limits, which typically places upward limits on the compensation awarded to individual loan originators through qualified plans. Consistent with its position in CFPB Bulletin 2012–2, the Bureau believes that these structural and operational requirements greatly reduce the likelihood of steering incentives.

Based on these considerations, proposed § 1026.36(d)(1)(iii) permits a person to compensate an individual loan originator through a contribution to a qualified defined contribution or benefit plan in which an individual loan originator employee participates, provided that the contribution is not directly or indirectly based on the terms of that individual loan originator's transactions subject to § 1026.36(d). Proposed comment 36(d)(1)–2.iii.E clarifies the types of plans that are considered qualified plans for purposes of § 1026.36(d)(1)(iii) (*i.e.,* plans, such as 401k plans, that satisfy the qualification requirements of section 401(a) of the IRC and applicable terms of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001, *et seq.,* the requirements for tax-sheltered annuity plans under IRC section 403(b), or governmental deferred compensation plans under IRC section 457(b)).

Proposed comment 36(d)(1)–2.iii.B clarifies the meaning of defined benefit plan and defined contribution plan as such terms are used in § 1026.36(d)(1)(iii). The proposed comment cross-references proposed comments 36(d)(1)–2.iii.E and –2.iii.G for guidance on the distinction between qualified and non-qualified plans and the relevance of such distinction to the provisions of proposed § 1026.36(d)(1)(iii).

The Bureau solicits comment on whether any other types of retirement plan, profit-sharing plan, or other defined benefit or contribution plans should be treated similarly to qualified plans for purposes of permitting contributions to such plans, even if the compensation relates directly or indirectly to the transaction terms of multiple individual loan originators. For example, the Bureau understands that some non-qualified pension plans limit distribution of funds to participating employees until their separation of service from their employer, which would seem to present more limited incentives to steer consumers to different loan terms.

Non-qualified plans. Proposed § 1026.36(d)(1)(iii) provides that, notwithstanding § 1026.36(d)(1)(i), an individual loan originator may receive, and a person may pay to an individual loan originator, compensation in the form of a bonus or other payment under a profit-sharing plan or a contribution to a defined benefit or contribution plan other than a qualified plan in certain circumstances. Specifically, the proposed rule permits such compensation even if the compensation directly or indirectly is based on the terms of the transactions subject to § 1026.36(d) of multiple individual loan originators, provided that the conditions set forth in proposed § 1026.36(d)(1)(iii)(A) and (B) are satisfied.

Proposed comment 36(d)(1)–2.iii.A provides guidance on the definition of profit-sharing plan as that term is used in proposed § 1026.36(d)(1)(iii). The proposed comment clarifies that for purposes of the rule, profit-sharing plans include so-called ''bonus plans,'' ''bonus pools,'' or ''profit pools'' from which a person or the business unit, as applicable, pays individual loan originators employed by the person (as well as other employees, if it so elects) bonuses or other compensation with reference to the profitability of the person or business unit, as applicable (*i.e.,* depending on the level within the company at which the profit-sharing plan is established). The proposed comment gives an example of a compensation structure that is a profit-sharing plan under § 1026.36(d)(1)(iii). The proposed comment also notes that a bonus that is made without reference to profitability, such a retention payment budgeted for in advance, does not violate the prohibition on payment of compensation based on transaction terms under § 1026.36(d)(1)(i), as clarified by proposed comment 36(d)(1)–1.ii, meaning that the provisions of proposed § 1026.36(d)(1)(iii) do not apply.

Proposed comment 36(d)(1)–2.iii.C clarifies that the compensation addressed in proposed § 1026.36(d)(1)(iii) directly or indirectly is based on the terms of transactions of multiple individual loan originators when the compensation, or its amount, results from or is otherwise related to the terms of multiple transactions subject to § 1026.36(d). The proposed comment provides that if a creditor does not permit its individual loan originator employees to deviate from the creditor's pre-established loan terms, such as the interest rate offered, then the creditor's payment of a bonus at the end of a calendar year to an individual loan originator under a profit-sharing plan is not related to the transaction terms of multiple individual loan originators. The proposed comment also clarifies that if a loan originator organization whose revenues are derived exclusively from fees paid by the creditors that fund its originations (*i.e.,* ''creditor-paid transactions'') pays a bonus under a profit-sharing plan, the bonus is permitted. Proposed comment 36(d)(1)–2.iii.C cross-references proposed comment 36(d)(1)–1.i and –1.ii for further guidance on when a payment is ''based on'' transaction terms.

Proposed comment 36(d)(1)–2.iii.D clarifies that, under proposed

[59] *See* Internal Revenue Serv., U.S. Dep't of the Treasury, Publication 560, *Retirement Plans for Small Businesses* (2012).

§ 1026.36(d)(1)(iii), the time period for which the compensation is paid is the time period for which the individual loan originator's performance was evaluated for purposes of the compensation decision (*e.g.,* calendar year, quarter, month), whether the compensation is actually paid during or after that time period. The proposed comment provides an example where a ''pre-holiday'' bonus paid in November is ''based on'' multiple individual loan originators' terms during the entire calendar year because it is paid following an accounting of multiple individual loan originators' transaction terms during the first three quarters of a calendar year and projected similar transaction terms for the remainder of the calendar year.

36(d)(1)(iii)(A)

Proposed § 1026.36(d)(1)(iii)(A) prohibits payment of compensation to an individual loan originator that directly or indirectly is based on the terms of that individual loan originator's transaction or transactions. This language is intended to underscore the fact that a person cannot pay compensation to an individual loan originator based on the terms of that individual loan originator's transactions regardless of whether the compensation is of the type that is permitted in limited circumstances under § 1026.36(d)(1)(iii)(B). Proposed comment 36(d)(1)–2.iii.F clarifies the provision by giving an example and cross-referencing proposed comment 36(d)(1)–1 for further guidance on determining whether compensation is ''based on'' transaction terms.

36(d)(1)(iii)(B)

36(d)(1)(iii)(B)(1)

Proposed § 1026.36(d)(1)(iii)(B)(*1*) permits a creditor or a loan originator organization to pay compensation in the form of a bonus or other payment under a profit-sharing plan (including bonus or profit pools) or a contribution to a non-qualified defined benefit or contribution plan where the steering incentives are sufficiently attenuated, even if the compensation is directly or indirectly based on the terms of transactions of multiple individual loan originators employed by the person. As described above, the Bureau is concerned that the current regulation does not provide the requisite clarity to address the potential steering incentives present where creditors or loan originator organizations reward their individual loan originator employees through compensation that is directly or indirectly based on the terms of multiple transactions of multiple individual loan originator employees. That said, the Bureau recognizes the challenges of developing a clear and practical standard to determine whether the particular compensation method creates incentives for individual loan originators to steer consumers into different loan terms. The Bureau is cognizant that a formulaic approach may pose challenges given the plethora of different entities that will be affected by this proposed rule, which vary greatly in size, organizational structure, diversity of business lines, and compensation structures. Depending on the circumstances, any or all of these factors could accentuate or mitigate the prevalence of steering incentives.

The Bureau also acknowledges the difficulty of establishing a direct nexus between the multiple individual loan originators' actions that may adversely affect consumers and the payment and receipt of bonuses or other compensation that directly or indirectly is based on the terms of those individual loan originators' transactions. Creditors and loan originator organizations use a variety of revenue and profitability measures, and each organization presumably employs methods of compensation that are tailored to fit their business needs. Therefore, a regulatory approach that addresses the potential steering incentives created by compensation methods that reward individual loan originators based on the collective terms of multiple transactions of multiple individual loan originators must be flexible enough to take such factors into account.

With these considerations in mind, the Bureau believes that proposed § 1026.36(d)(1)(iii)(B)(*1*) balances the need for a bright-line rule with the recognition that a rigid, one-size-fits-all approach may not be workable in light of the wide spectrum of size, type, and business line diversity of the companies that would be subject to the requirement. Assuming that the conditions set forth in proposed § 1026.36(d)(1)(iii)(A) have been met, proposed § 1026.36(d)(1)(iii)(B)(*1*) permits compensation in the form of a bonus or other payment under a profit-sharing plan or a contribution to a non-qualified defined benefit or contribution plan, even if the compensation relates directly or indirectly to the terms of the transactions subject to § 1026.36(d) of multiple individual loan originators, so long as not more than a certain percentage of the total revenues of the person or business unit to which the profit-sharing plan applies, as applicable, are derived from the person's mortgage business during the tax year immediately preceding the tax year in which the compensation is paid. As described below, the Bureau is proposing two alternatives for the threshold percentage—50 percent, under Alternative 1 proposed by the Bureau, or 25 percent, under Alternative 2 proposed by the Bureau. To ascertain whether the conditions under § 1026.36(d)(1)(iii)(B)(*1*) are met, a person measures the revenue of the mortgage business divided by the total revenue of the person or business unit, as applicable. Section 1026.36(d)(1)(iii)(B)(*1*) explains how total revenues are determined, when the revenues of a person's affiliates are or are not taken into account, and how total revenues derived from the mortgage business are determined. Proposed comment 36(d)(1)–2.iii provides additional guidance on the meaning of the terms total revenue, mortgage business, and tax year under proposed § 1026.36(d)(1)(iii)(B)(*1*), all discussed below.

The proposed revenue test is intended as a bright-line rule to distinguish methods of compensation where there is a substantial risk of consumers being steered to different loan terms from compensation methods where steering potential is sufficiently attenuated. The proposed bright-line rule recognizes the intertwined relationship among the person's revenues, profitability, and payment of compensation to its individual loan originators. The aggregate loan terms of multiple transactions at a creditor or loan originator organization within a given time period generally affect the revenues of that creditor or loan originator organization during that period. The creditor or loan originator organization's revenues during that period, in turn, generally affect the profitability of the person during that period. And the profitability of the creditor or loan originator organization presumably relates to—if not determines—the amount of compensation available for the profit-sharing plan, bonus pool, or profit pool and distributed to individual loan originators in the form of bonuses or contributions to defined benefit or contribution plans. In other words, the Bureau is treating revenue as a proxy for profitability, and profitability as a proxy for transaction terms in the aggregate.

Furthermore, the Bureau is proposing a threshold of 50 percent because if more than 50 percent of the person's total revenues are derived from the person's mortgage business, the mortgage business revenues are predominant, at which point the attendant steering incentives seem most

likely to exist.[60] For example, loans with higher interest rate spreads over the creditor's minimum acceptable rate, all else being equal, will yield greater amounts of interest payments if the loans are kept in portfolio by the creditor and a greater gain on sale if sold on the secondary market. As discussed above, in general revenues drive profitability and profitability relates to, if not drives, decisions about compensation for individual loan originators. Thus, if the mortgage-related revenues predominate, there is more risk that the individual loan originators, whose transactions generate mortgage business revenue, will be incentivized to upcharge or otherwise steer consumers to different loan terms. On the other hand, where the person's revenues do not predominantly consist of revenue from its mortgage business, the connection between revenue received from multiple individual loan originators' transactions and the payment from the profit-sharing plan or contribution to the defined benefit or contribution plan in which the individual loan originator participates may be sufficiently attenuated to mitigate steering concerns given the number of other employees, products or services, and other actions that contribute to the overall profitability of the company.

The Bureau recognizes, however, that a bright-line rule with a threshold set at 50 percent of total revenue may not be commensurate in all cases with steering incentives in light of the differing sizes, organizational structures, and compensation structures of the persons affected by the proposed rule. Even if the mortgage business does not predominate the overall generation of revenues, the revenues may be sufficiently high that, in view of other facts and circumstances, the connection between the mortgage-business revenue generated and the compensation paid to individual loan originators may not be sufficiently attenuated, and thus still present a steering risk. Therefore, the Bureau is proposing an alternative approach that includes the same regulatory text and commentary language but contains a stricter threshold amount of 25 percent for purposes of the revenue test under § 1026.36(d)(1)(iii)(B)(*1*). The Bureau solicits comment on whether 50 percent, 25 percent, or a different threshold amount would better effectuate the purposes of the rule.

The Bureau is also aware of the potential differential effects the provisions of § 1026.36(d)(1)(iii)(B)(*1*) may have on small creditors and loan originator organizations that employ individual loan originators when compared to the effects on larger institutions. In particular, the Bureau recognizes that loan originator organizations that originate loans as their exclusive, or primary, line of business will, barring diversification of their business lines, not be able to pay the types of compensation that are permitted in limited circumstances under § 1026.36(d)(1)(iii)(B)(*1*). During the Small Business Review Panel process, a SER stated that there should be no threshold limit because any limit would disadvantage small businesses that originate only mortgages. In response to this and other SERs' feedback, the Small Business Review Panel recommended that the Bureau seek public comment on the ramifications for small businesses and other businesses of setting the revenue limit at 50 percent of company revenue or at other levels. The Small Business Review Panel also recommended that the Bureau solicit public comment on the treatment of qualified and non-qualified plans and whether treating qualified plans differently than non-qualified plans would adversely affect small creditors and loan originator organizations relative to large creditors and loan originator organizations. The Bureau accordingly seeks comment on these issues. The Bureau is also proposing, as discussed in the section-by-section analysis to proposed § 1026.36(d)(1)(iii)(B)(*2*), below, to permit compensation in the form of bonuses and other payments under profit-sharing plans and contributions to non-qualified defined benefit or contribution plans where an individual loan originator is the loan originator for five or fewer transactions within the 12-month period preceding the payment of the compensation. The Bureau expects that for some small entities, this de minimis exception should address some of the concerns expressed by the small entity representatives.

Revenue Test Formula

Proposed comment 36(d)(1)–2.iii.G clarifies various aspects of the revenue test. Proposed comment 36(d)(1)–2.iii.G.*1* addresses the measurement of total revenue under the revenue test formula, which pursuant to § 1026.36(d)(1)(iii)(B)(*1*) is the person's total revenues or the total revenues of the business unit to which the profit-sharing plan applies, as applicable, during the tax year immediately preceding the tax year in which the compensation is paid. The comment clarifies that under this provision, whether the revenues of the person or business unit are used depends on the level within the person's organizational structure at which the profit-sharing plan is established and whose profitability is referenced for purposes of payment of the compensation. The comment provides that if the profitability of the person is referenced for purposes of establishing the profit-sharing plan, then the total revenues of the person are used, and gives an example of how total revenues are calculated for a creditor that has two separate business units. The Bureau believes that the total revenues for purposes of the revenue test under § 1026.36(d)(1)(iii)(B)(*1*) must reflect the revenues of the business unit within the company whose profitability is referenced for purposes of paying compensation to the individual loan originators, because including the revenues of business units to which the profit-sharing plan does not apply would lead to an artificially over-inclusive measurement of total revenues, thus undermining the purpose of the revenue test in § 1026.36(d)(1)(iii)(B)(*1*). For example, if the overall revenues of a creditor with diverse revenue sources across business units were included in the total revenues regardless of the level in the ownership structure at which the profit-sharing plan was established, the creditor could establish a profit-sharing plan at the level of the mortgage business unit to pay bonuses to individual loan originators only, and yet still pass the revenue test. This type of arrangement is one where incentives to steer consumers to different loan terms are present, and therefore the Bureau believes that it should be captured by the revenue test.

Proposed comment 36(d)(1)–2.iii.G.*1* also clarifies that a tax year is the person's annual accounting period for keeping records and reporting income and expenses (*i.e.,* it may be a calendar year or a fiscal year depending on the person's annual accounting period) and gives an example showing how the revenue test is applied in the context of a creditor that uses a calendar year accounting period. The Bureau acknowledges that taking only one tax year's revenues into account necessitates an annual reevaluation of whether the revenue test is met. This also could result in a person with

[60] In its materials prepared for the Small Business Review Panel process in May 2012, the Bureau indicated that it was considering a revenue test threshold of between 20 and 50 percent. As noted above, the Bureau is proposing two alternative threshold amounts—50 percent and 25 percent—and is soliciting comment on whether the threshold should be different.

relatively consistent revenue flow over a number of years falling above or below the threshold based on an anomalous tax year where revenues fluctuate greatly for reasons that are not related to incentive structures. Moreover, the proposed rule requires evaluation of the previous tax year's revenues. This means that, for example, whether a company can pay a bonus under a profit-sharing plan in December of a particular year might, under the proposed revenue test, depend in part on the level of mortgage business and total revenues generated beginning in January of the previous calendar year (*i.e.,* 23 months prior), which in the context may be a stale data point. The Bureau, therefore, solicits comment on whether the total revenues should instead be based on a rolling average of revenues over two tax years, a rolling average of revenues during the 12 months preceding the decision to make the compensation payment, or another time period.

Section 1026.36(d)(1)(iii)(B)(*1*) also provides that total revenues are determined through a methodology that is consistent with generally accepted accounting principles and, as applicable, the reporting of the person's income for purposes of Federal tax filings or, if none, any industry call reports filed regularly by the person. As applicable, the methodology also shall reflect an accurate allocation of revenues among the person's business units. The proposed commentary notes that industry call reports filed regularly by the person could, depending on the person, include the NMLSR Mortgage Call Report or the National Credit Union Administration (NCUA) Call Report. The proposed commentary also notes that a Federal credit union that is exempt from paying Federal income tax would, under the proposed rule, use a methodology to determine total annual revenues that reflects the income reported in any NCUA Call Reports filed by the credit union; if none, the methodology otherwise must be consistent with GAAP and, as applicable, reflects an accurate allocation of revenues among the credit union's business units. The Bureau is proposing that a person determine total revenues in this manner to ensure that the measurement of total revenues is methodologically sound and consistent with the company's own reporting of income for Federal tax purposes or, if none, any industry call reports filed regularly by the person, and to ensure that it is not subject to manipulation to produce an outcome favorable to the company (presumably, a total revenue measurement of over 50 percent or 25 percent, depending on the alternative threshold chosen for the revenue test). The Bureau solicits comment on whether this standard for measuring total revenues is appropriate in light of the diversity in size of the financial institutions that would be subject to the requirement and, more generally, on what types of income should be included in the definition of total revenues. The Bureau also solicits comment on whether the definition of total revenues should be tied to a more objective standard such as the Bureau's definition of ''receipts'' in the Bureau's final ''larger participants'' rule regarding the supervision of consumer reporting agencies.[61]

The Bureau recognizes that some of the creditors and loan originator organizations subject to this proposed rule may have numerous business organizations set up under common ownership, and the determination of profitability (which, in turn, relates to compensation decisions) may be made at a different level than by the management of the individual loan originators' business unit. Moreover, the nature of the ownership hierarchy, both horizontal and vertical, and the level of proximity within the organization among the individual loan originators, the employees of the other business units, and the compensation decision-makers all may serve to reduce or enhance the prevalence of steering incentives depending on the circumstances. In general, the Bureau believes that the revenues of the business organization or unit whose profits are used as reference for compensation decisions—whether the person, a business unit within the person, or an affiliate of the person—should be the business organization or unit whose revenues are evaluated for purposes of proposed § 1026.36(d)(1)(iii)(B)(*1*). Therefore, proposed § 1026.36(d)(1)(iii)(B)(*1*) states that the revenues of the person's affiliates generally are not taken into account for purposes of the revenue test unless the profit-sharing plan applies to the affiliate, in which case the person's total revenues also include the total revenues of the affiliate. Proposed comment 36(d)(1)–2.iii.G.*1* notes that the profit-sharing plan applies to the affiliate when, for example, the funds used to pay a bonus to an individual loan originator are the same funds used to pay a bonus to employees of the affiliate. The Bureau solicits comment on whether the revenues of affiliates should be treated in a different manner for purposes of the revenue test under § 1026.36(d)(1)(iii)(B)(*1*).

Section 1026.36(d)(1)(iii)(B)(*1*) provides that the revenues derived from mortgage business are the portion of those total revenues that are generated through a person's transactions subject to § 1026.36(d). Proposed comment 36(d)(1)–2.iii.G.*2* clarifies that, pursuant to § 1026.36(j) and comment 36–1, § 1026.36(d) applies to closed-end consumer credit transactions secured by dwellings and reverse mortgages that are not home-equity lines of credit under § 1026.40. The proposed comment also gives guidance that a person's revenues from its mortgage business include, for example: origination fees and interest associated with loans for purchase money or refinance purposes originated by individual loan originators employed by the person, income from servicing of loans for purchase money or refinance purposes originated by individual loan originators employed by the person, and proceeds of secondary market sales of loans for purchase money or refinance purposes originated by individual loan originators employed by the person. The proposed comment further notes that revenues derived from mortgage business do not include, for example, servicing income where the loans being serviced were purchased by the person after their origination by another person. This distinction is drawn because the individual loan originators employed by a particular creditor or loan originator organization do not have steering incentives when the loans being serviced were originated by another person. In addition, origination fees, interest, and secondary market sale proceeds associated with home-equity lines of credit, loans secured by consumers' interests in timeshare plans, or loans made primarily for business, commercial, or agricultural purposes are not counted as mortgage business revenues because such transactions are outside the coverage of § 1026.36(d). In light of the distinctions drawn to include and exclude categories of mortgage-related revenues for purposes of the revenue test, the Bureau requests comment on the scope of revenues included in the definition of mortgage revenues. The Bureau also recognizes that the definition of mortgage business revenues, as clarified by proposed comment 36(d)(1)–2.iii.G.*2,* includes revenues, such as origination fees,

[61] Defining Larger Participants of the Consumer Reporting Market, 77 FR 42873 (July 20, 2012) (to be codified at 12 CFR part 1090). In the final rule, the Bureau noted that the proposed definition of ''annual receipts'' is adapted in part from the existing measure used by the U.S. Small Business Administration (SBA) for its small business loan programs.

interest, and servicing income, of transactions subject to § 1026.36(d) that were originated before the current regulation on mortgage loan origination went into effect. During the Small Business Review Panel process, the SERs asserted that using mortgage revenue as a standard would be over-inclusive because the standard would capture income from all mortgage loans, including existing portfolio loans, rather than only newly originated loans. The Bureau thus solicits comment on whether revenues associated with transactions originated prior to the effect of the Board's 2010 Loan Originator Final Rule or this proposed rule (if adopted) should be excluded.

Alternative Approaches to Revenue Test

The Bureau recognizes that, for purposes of proposed § 1026.36(d)(1)(iii)(B)(*1*), a formula that utilizes profitability as a measuring point may be more appropriate than revenues. Compensation decisions are more likely to relate to profits than revenues because the funds available for bonuses will be driven by the amount remaining following payment of expenses, rather than the gross revenues generated by the company. Focusing on revenues may be an imperfect test to measure the relationship between the mortgage business and the profitability of the person or business unit, as applicable (which, in turn, relates to the compensation decisions). For example, a company could derive 40 percent of its total revenues from its mortgage business, but that same line of business may generate 80 percent of the company's profits. In such an instance, the steering incentives could be significant given the impact the mortgage business has on the company's overall profitability. Yet, under the revenue test this organization would be permitted to pay certain compensation based on terms of multiple individual loan originators' transactions taken in the aggregate. The Bureau believes a test based on profitability would create significant challenges, such as the need to define profitability and the question of how affiliate relationships are addressed. Such an approach could require detailed, complex rules to clarify how the test works. Moreover, the Bureau is concerned that using profitability as the metric could lead to evasion of the rule if a person were to allocate costs in a manner across business lines that would lead to understatement of the mortgage business profits (making it more likely that the revenue test would be passed even though steering incentives are still present). In light of these considerations, the Bureau solicits comment on whether the formula under § 1026.36(d)(1)(iii)(B)(*1*) should be changed to the total profits of the mortgage business divided by the total profits of the person or business unit, as applicable, and, if so, how profits should be calculated.

The Bureau recognizes that concerns about individual loan originators steering consumers to different loan terms may vary depending on the proportion of an individual loan originator's total compensation that is attributable to payments permitted under § 1026.36(d)(1)(iii)(B)(*1*). Thus, the Bureau additionally solicits comment on whether to establish a cap on the percentage of an individual loan originator's total compensation that can be attributable to payments permitted under § 1026.36(d)(1)(iii)(B)(*1*), either in addition to or in lieu of the proposed revenue test. The Bureau also solicits comment on the appropriate threshold amount if the Bureau were to adopt a total compensation test.

The Bureau recognizes that the bright-line standard in proposed § 1026.36(d)(1)(iii)(B)(*1*) creates an ''exempt or non-exempt'' approach that prohibits the payment of bonuses and other compensation and the making of contributions to non-qualified defined benefit and contribution plans if the creditor or loan origination organization has mortgage business revenues of greater than 50 percent of its total revenues (under Alternative 1 proposed by the Bureau), 25 percent of its total revenues (under Alternative 2 proposed by the Bureau), or some lesser percentage that the Bureau may determine to be more appropriate. The Bureau acknowledges that terms of multiple individual loan originators' transactions taken in the aggregate will not, in every instance, have a substantial effect on profitability, and likewise there are occasions where the profitability will relate only insubstantially to the compensation. However, the Bureau believes that it is critical to create a workable test that does not have significant complexity. Otherwise, it may be difficult for creditors and loan originator organizations to employ the test. The Bureau also recognizes that any test is likely to be both under- and over-inclusive.

Consequently, the Bureau solicits comment on whether it should include an additional provision under § 1026.36(d)(1)(iii)(B) that would permit bonuses under a profit-sharing plan or contributions to non-qualified defined benefit or contribution plans where the compensation bears an insubstantial relationship to the terms of transactions subject to § 1026.36(d) of multiple individual loan originators. This test would look to whether the aggregate loan terms of multiple individual loan originators is only one factor or variable among multiple significant factors or variables taken into account in the compensation decision and does not affect the outcome of the compensation decision to a substantial degree. For example, if a creditor pays a year-end bonus based on formula that includes ten different factors, all of which are permissible under § 1026.36(d)(1) (*e.g.,* performance of loans, amount of credit extended, amount of transactions closed relative to application), and the profitability of the creditor will make only a marginal difference of two percent as to the amount of bonus paid (*e.g.,* an individual loan originator who receives a $2,000 bonus would receive a $1,960 bonus but for the fact that the person's profitability was taken into account in determining the bonus), the creditor might, depending on the facts and circumstances, demonstrate that the compensation is substantially independent of the terms of transactions subject to § 1026.36(d) of multiple individual loan originators. It is unclear, however, how such a test would work in practice and what standards would apply to determine if compensation is substantially independent. Nonetheless, the Bureau solicits comment on whether such an additional provision should be included under § 1026.36(d)(1)(iii).

36(d)(1)(iii)(B)(2)

Proposed § 1026.36(d)(1)(iii)(B)(*2*) permits a person to pay, and an individual loan originator to receive, compensation in the form of a bonus or other payment under a profit-sharing plan sponsored by the person or a contribution to a non-qualified defined contribution or benefit plan if the individual is a loan originator (as defined in proposed § 1026.36(a)(1)(i)) for five or fewer transactions subject to § 1026.36(d) during the 12-month period preceding the compensation decision. This compensation is permitted even when the payment or contribution relates directly or indirectly to the terms of the transactions subject to § 1026.36(d) of multiple individual loan originators.

The intent of proposed § 1026.36(d)(1)(iii)(B)(*2*) is to exempt individual loan originators who engage in a de minimis number of transactions subject to § 1026.36(d) from the restrictions on payment of bonuses and making of contributions to defined benefit and defined contribution plans that are not qualified plans. The Bureau

is proposing to exempt individual loan originators who are loan originators for five or fewer transactions within a 12-month period preceding the date of the decision to pay the compensation. Under TILA, a person is not considered a creditor unless the person regularly extends credit, which with respect to consumer credit transactions secured by a dwelling is at least five transactions per calendar year. *See* § 1026.2(a)(17)(v). The Bureau believes, by analogy, that an individual loan originator who is a loan originator for five or fewer transactions is not truly active as an individual loan originator and thus is insufficiently incentivized to steer consumers to different loan terms. Proposed comment 36(d)(1)–2.iii.H also provides an example of the de minimis transaction exception as applied to a loan originator organization employing six individual loan originators.

The Bureau solicits comment on the number of individual loan originators who will be affected by the exception and whether, in light of such number, the de minimis test is necessary. The Bureau also solicits comment on the appropriate number of originations that should constitute the de minimis standard, over what time period the transactions should be measured, and whether this standard should be intertwined with the potential total compensation test on which the Bureau is soliciting comment, discussed in the section-by-section analysis to proposed § 1026.36(d)(1)(iii)(B)(*1*). The Bureau, finally, solicits comment on whether the 12-month period used to measure whether the individual loan originator has a de minimis number of transactions should end on the date on which the compensation is paid, rather than the date on which the compensation decision is made. The Bureau believes that having the 12-month period end on the date on which the decision is made will be simpler for compliance purposes because it would require the person to verify whether the individual loan originator is eligible for the compensation payment when making the decision, but not thereafter. If the 12-month period were to end on the date of the payment, the employer presumably would have to verify the number of transactions twice—at the time the person decides to award the compensation to the individual loan originator, and again before the compensation is paid (assuming there is a time lag between the decision and the payment). The Bureau recognizes, however, that the date on which the compensation is paid may be more easily documentable (*e.g.,* through a payroll stub) for purposes of the recordkeeping requirements proposed under § 1026.25(c)(2).

Proposed comment 36(d)(1)–2.iii.I.1 and –2.iii.I.2 illustrates the effect of proposed § 1026.36(d)(1)(iii)(A) and (B) on a company that has mortgage and credit card businesses and harmonizes through examples the concepts discussed in other proposed comments to § 1026.36(d)(1)(iii).

36(d)(2) Payments by Persons Other Than Consumer

36(d)(2)(i) Dual Compensation

Background

Section 1026.36(d)(2) currently provides that if any loan originator receives compensation directly from a consumer in a consumer credit transaction secured by a dwelling: (1) No loan originator may receive compensation from another person in connection with the transaction; and (2) no person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) may pay any compensation to a loan originator in connection with the transaction.

Comment 36(d)(2)–1 currently provides that the restrictions imposed under § 1026.36(d)(2) relate only to payments, such as commissions, that are specific to and paid solely in connection with the transaction in which the consumer has paid compensation directly to a loan originator. Thus, the phrase ''in connection with the transaction'' as used in § 1026.36(d)(2) does not include salary or hourly wages that are not tied to a specific transaction.

Thus, under current § 1026.36(d)(2), a loan originator that receives compensation directly from the consumer may not receive compensation in connection with the transaction (*e.g.,* a commission) from any other person (*e.g.,* a creditor). In addition, if any loan originator is paid compensation directly by the consumer in a transaction, no other loan originator may receive compensation in connection with the transaction from a person other than the consumer. Moreover, if any loan originator receives compensation directly from a consumer, no person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) may pay any compensation to a loan originator in connection with the transaction. For example, assume that a loan originator that is not a natural person (loan originator organization) receives compensation directly from the consumer in a mortgage transaction subject to § 1026.36(d)(2). The loan originator organization may not receive compensation in connection with that particular transaction (*e.g.,* a commission) from a person other than the consumer (*e.g.,* the creditor). In addition, because the loan originator organization is a person other than the consumer, the loan originator organization may not pay individual loan originators any compensation, such as a transaction-specific commission, in connection with that particular transaction. Consequently, under current rules, in the example above, the loan originator organization must pay individual loan originators only in the form of a salary or hourly wage or other compensation that is not tied to the particular transaction.

The Dodd-Frank Act

Section 1403 of the Dodd-Frank Act added TILA section 129B. 12 U.S.C. 1639b. TILA section 129B(c)(2)(A) states that, for any mortgage loan, a mortgage originator generally may not receive from any person other than the consumer any origination fee or charge except bona fide third-party charges not retained by the creditor, mortgage originator, or an affiliate of either. Likewise, no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator, may pay a mortgage originator any origination fee or charge except bona fide third-party charges as described above. Notwithstanding this general prohibition on payments of any origination fee or charge to a mortgage originator by a person other than the consumer, TILA section 129B(c)(2)(B) provides that a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if: (1) The mortgage originator does not receive any compensation directly from the consumer; and (2) ''the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator).'' TILA section 129B(c)(2)(B) also provides the Bureau authority to waive or create exemptions from this prohibition on consumers paying upfront discount points, origination points or fees where doing so is in the interest of consumers and the public.

The Bureau's Proposal

As explained in more detail below, while the statute is structured differently and uses different terminology than existing § 1026.36(d)(2), the restrictions on dual compensation set forth in existing § 1026.36(d)(2) generally are consistent with the restrictions on dual compensation set forth in TILA section 129B(c)(2). Nonetheless, the Bureau proposes several changes to existing § 1026.36(d)(2) (re-designated as § 1026.36(d)(2)(i)) to provide additional guidance and flexibility to loan originators. For example, as explained in more detail below, in response to questions, the Bureau proposes to provide additional guidance on whether compensation to a loan originator paid on the borrower's behalf by a person other than a creditor or its affiliates, such as a non-creditor seller, home builder, home improvement contractor or real estate broker or agent, is considered compensation received directly from a consumer for purposes of § 1026.36(d)(2)(i). Specifically, the Bureau proposes to add § 1026.36(d)(2)(i)(B) and comment 36(d)(2)–2.iii to clarify that such payments to a loan originator are considered compensation received directly from the consumer for purposes of § 1026.36(d)(2) if they are made pursuant to an agreement between the borrower and the person other than the creditor or its affiliates.

In addition, currently, § 1026.36(d)(2) prohibits a loan originator organization that receives compensation directly from a consumer in connection with a transaction from paying compensation in connection with that transaction to individual loan originators (such as its employee brokers), although the organization could pay compensation that is not tied to the transaction (such as salary or hourly wages) to individual loan originators. As explained in more detail below, the Bureau proposes to revise § 1026.36(d)(2) (re-designated as § 1026.36(d)(2)(i)) to provide that, if a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator organization may pay compensation in connection with the transaction to individual loan originators and the individual loan originators may receive compensation from the loan originator organization. As explained in more detail below, the Bureau believes that allowing loan originator organizations to pay compensation in connection with a transaction to individual loan originators, even if the loan originator organization has received compensation directly from the consumer in that transaction, is consistent with the statutory purpose of ensuring that a loan originator organization is not compensated by both the consumer and the creditor for the same transaction because whether and how the loan originator organization splits its compensation with its individual loan originators does not affect the total amount of compensation paid by the consumer (directly or indirectly).

As discussed in more detail below, the Bureau also believes that the original purpose of the restriction in current § 1026.36(d)(2) is addressed separately by other revisions pursuant to the Dodd-Frank Act. Under current § 1026.36(d)(1)(iii), compensation paid directly by a consumer to a loan originator could be based on loan terms and conditions. Consequently, individual loan originators could have incentives to steer a consumer into a transaction where the consumer compensates the loan originator organization directly, resulting in greater compensation to the loan originator organization than it could receive if compensated by the creditor subject to the restrictions of § 1026.36(d)(1). The Dodd-Frank Act prohibits compensation based on loan terms, even when a consumer is paying compensation directly to a mortgage originator. Thus, if an individual loan originator receives compensation in connection with the transaction from the loan originator organization (where the loan originator organization receives compensation directly from the consumer), the amount of the compensation paid by the consumer to the loan originator organization, and the amount of the compensation paid by the loan originator organization to the individual loan originator, cannot be based on loan terms.

In addition, with this proposed revision, more loan originator organizations may be willing to structure transactions where consumers pay loan originator compensation directly. The Bureau believes that this result may enhance the interests of consumers and the public by giving consumers greater flexibility in structuring the payment of loan originator compensation.

The Bureau's proposal on restrictions related to dual compensation as set forth in proposed § 1026.36(d)(2)(i) are discussed in more detail below.

Compensation received directly from the consumer. As discussed above, under § 1026.36(d)(2), a loan originator that receives compensation directly from the consumer may not receive compensation in connection with the transaction (*e.g.,* a commission) from any other person (*e.g.,* a creditor). In addition, if *any* loan originator is paid compensation directly by the consumer in a transaction, no other loan originator (such as an employee of a loan originator organization) may receive compensation in connection with the transaction from another person. Moreover, if any loan originator receives compensation directly from a consumer, no person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) may pay any compensation to a loan originator, directly or indirectly, in connection with the transaction. Existing comment 36(d)(1)–7 provides guidance on when payments to a loan originator are considered compensation received directly from the consumer. The Bureau proposes to delete the first sentence of this comment because it is no longer relevant given that the Bureau proposes to remove § 1026.36(d)(1)(iii), as discussed above under the section-by-section analysis to proposed § 1026.36(d)(1). The Bureau also proposes to move the other content of this comment to proposed comment 36(d)(2)–2.i; no substantive change is intended.

Existing comment 36(d)(2)–2 references Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), and provides that a yield spread premium paid by a creditor to the loan originator may be characterized on the RESPA disclosures as a ''credit'' that will be applied to reduce the consumer's settlement charges, including origination fees. Existing comment 36(d)(2)–2 clarifies that a yield spread premium disclosed in this manner is not considered to be received by the loan originator directly from the consumer for purposes of § 1026.36(d)(2). The Bureau proposes to move this guidance to proposed comment 36(d)(2)(i)–2.ii and revise it. The Bureau proposes to revise the guidance in proposed comment 36(d)(2)(i)–2.ii recognizing that § 1026.36 prohibits yield spread premiums and overages. Yield spread premiums and overages were additional sums (premiums or bonuses) paid to mortgage brokers and loan officers, respectively, for selling consumers an interest rate that is higher than the minimum rate the creditor would be willing to offer a particular consumer based on the creditor's specific underwriting criteria (*i.e.,* the difference in interest rate yield, the yield spread, or overage) without the borrower paying

points to reduce this minimum rate further. Yield spread premiums or overages also differed significantly from lender credits or rebates because the loan originator had the discretion to retain all of the proceeds obtained from the yield spread premium or overage and not use any proceeds to reduce the borrower's settlement costs.

''Rebates,'' ''credits,'' or ''lender credits'' on the other hand are paid by the creditor for the interest rate chosen by the consumer or on behalf of the consumer to reduce the consumer's settlement costs. Comment 36(d)(2)–2 (re-designated as proposed comment 36(d)(2)(i)–2.ii) would be revised to use the term ''rebates'' and ''credits,'' instead of yield spread premiums. Rebates are disclosed as ''credits'' under the current Regulation X disclosure regime.

The Bureau also proposes to add § 1026.36(d)(2)(i)(B) and comment 36(d)(2)(i)–2.iii to provide additional guidance on the phrase ''compensation directly from the consumer'' as used in new TILA section 129B(c)(2)(B), as added by section 1403 of the Dodd-Frank Act, and § 1026.36(d)(2) (as re-designated proposed § 1026.36(d)(2)(i)). Mortgage creditors and other industry representatives have raised questions about whether payments to a loan originator on behalf of the borrower by a person other than the creditor are considered compensation received directly from a consumer for purposes of § 1026.36(d)(2). For example, non-creditor sellers, home builders, home improvement contractors, or real estate brokers or agents may agree to pay some or all of the consumer's closing costs. Some of this payment may be used to compensate a loan originator. In proposed § 1026.36(d)(2)(i)(B), the Bureau proposes to interpret the phrase ''compensation directly from the consumer'' as used in new TILA section 129B(c)(2)(B) and proposed § 1026.36(d)(2)(i) to include payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates. Proposed comment 36(d)(2)(i)–2.iii clarifies that whether there is an agreement between the parties will depend on State law. *See* § 1026.2(b)(3). Also, proposed comment 36(d)(2)(i)–2.iii makes clear that the parties do not have to agree specifically that the payments will be used to pay for the loan originator's compensation, but just that the person will make a payment toward the borrower's closing costs. For example, assume that a non-creditor seller has an agreement with the borrower to pay $1,000 of the borrower's closing costs on a transaction. Any of the $1,000 that is used to pay compensation to a loan originator is deemed to be compensation received directly from the consumer, even if the agreement does not specify that some or all of $1,000 must be used to compensate the loan originator. In such cases, the loan originator would be permitted to receive compensation from both the consumer and the other person who has the agreement with the consumer (but not from any other person).

The Bureau believes that arrangements where a person other than a creditor or its affiliate pays compensation to a loan originator on behalf of the borrower do not raise the same concerns as when that compensation is being paid by the creditor or its affiliates. The Bureau believes that one of the primary goals of section 1403 of the Dodd-Frank Act is to restrict a loan originator from receiving compensation both directly from a consumer and from the creditor or its affiliates, which more easily may occur without the consumer's knowledge. Allowing loan originators to receive compensation from both the consumer and the creditor can create inherent conflicts of interest of which consumers may not be aware. When a loan originator organization charges the consumer a direct fee for arranging the consumer's mortgage loan, this charge may lead the consumer to infer that the broker accepts the consumer-paid fee to represent the consumer's financial interests. Consumers also may reasonably believe that the fee they pay is the originator's sole compensation. This may lead reasonable consumers erroneously to believe that loan originators are working on their behalf, and are under a legal or ethical obligation to help them obtain the most favorable loan terms and conditions. Consumers may regard loan originators as ''trusted advisors'' or ''hired experts,'' and consequently rely on originators' advice. Consumers who regard loan originators in this manner may be less likely to shop or negotiate to assure themselves that they are being offered competitive mortgage terms.

The Bureau believes, however, that the statutory goals discussed above are facilitated by proposed § 1026.36(d)(2)(i)(B) and comment 36(d)(2)(i)–2.iii. Under the proposal, a payment by a person other than a creditor or its affiliates is considered received directly from the consumer for purposes of § 1026.36(d)(2) only if the payment is made pursuant to an agreement between the consumer and that person. Thus, if there is an agreement, presumably the consumer will be aware of the payment. In addition, because this payment would be considered compensation directly received from the consumer, the consumer is the only other person in the transaction that could pay compensation in connection with the transaction to the loan originator. For example, the creditor or its affiliates could not pay compensation in connection with the transaction to the loan originator.

In addition, the Bureau believes that proposed § 1026.36(d)(2)(i)(B) and comment 36(d)(2)(i)–2.iii help prevent circumvention of the dual compensation provisions. If payments by persons other than the creditor or its affiliates were not deemed to be compensation directly from the consumer, a loan originator could arrange for the consumer to pay compensation to such a person and for that person to pay the compensation to the loan originator. Because this payment would not be deemed to be coming directly from the consumer, the loan originator could receive compensation from a creditor and this other person, circumventing the dual compensation rules.

Under proposed § 1026.36(d)(2)(i)(B) and comment 36(d)(2)(i)–2.iii, payment of loan originator compensation by an affiliate of the creditor, including a seller, home builder, home improvement contractor, etc., to a loan originator is not deemed to be made directly by the consumer for purposes of § 1026.36(d)(2) (re-designated as proposed § 1026.36(d)(2)(i)), even if the payment is made pursuant to an agreement between the borrower and the affiliate. That is, for example, if a home builder is an affiliate of a creditor, proposed § 1026.36(d)(2)(i) prohibits this person from paying compensation in connection with a transaction if a consumer pays compensation to the loan originator in connection with the transaction. This proposal is consistent with current § 1026.36(d)(3), which states that for purposes of § 1026.36(d) affiliates must be treated as a single ''person.'' In addition, considering payments of compensation to a loan originator by an affiliate of the creditor to be payments directly made by the consumer may allow creditors to circumvent the restrictions in proposed § 1026.36(d)(2)(i). A creditor could provide compensation to the loan originator indirectly by structuring the arrangement such that the creditor pays the affiliate and the affiliate pays the loan originator.

Prohibition on a loan originator receiving compensation in connection with a transaction from both the consumer and a person other than the

consumer. As discussed above, under § 1026.36(d)(2), a loan originator that receives compensation directly from the consumer in a closed-end consumer credit transaction secured by a dwelling may not receive compensation from any other person in connection with the transaction. In addition, in such cases, no person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) may pay any compensation to the loan originator in connection with the transaction. Current comment 36(d)(2)–1 provides that, for purposes of § 1026.36(d)(2), compensation that is ''in connection with the transaction'' means payments, such as commissions, that are specific to, and paid solely in connection with, the transaction in which the consumer has paid compensation directly to a loan originator. To illustrate: Assume that a loan originator organization receives compensation directly from the consumer in a mortgage transaction subject to § 1026.36(d)(2). Because the loan originator organization is receiving compensation directly from the consumer in this transaction, the loan originator organization is restricted under § 1026.36(d)(2) from receiving compensation in connection with that particular transaction (*e.g.,* a commission) from a person other than the consumer (*e.g.,* the creditor). Similarly, a person other than the consumer may not pay the loan originator any compensation in connection with the transaction.

Except as provided below, the Bureau proposes to retain the prohibition described above in current § 1026.36(d)(2) (re-designated as § 1026.36(d)(2)(i)), as consistent with the restriction on dual compensation set forth in TILA section 129B(c)(2). Specifically, TILA section 129B(c)(2)(A) provides that for any mortgage loan, a mortgage originator generally may not receive from any person other than the consumer any origination fee or charge except bona fide third-party charges not retained by the creditor, the mortgage originator, or an affiliate of either. Likewise, no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator, may pay a mortgage originator any origination fee or charge except bona fide third party charges as described above. In addition, section 129B(c)(2)(B) provides that a mortgage originator may receive an origination fee or charge from a person other than the consumer if, among other things, the mortgage originator does not receive any compensation directly from the consumer.

Pursuant to its authority under TILA section 105(a) to effectuate the purposes of TILA and facilitate compliance with TILA, the Bureau interprets ''origination fee or charge'' to mean compensation that is paid ''in connection with the transaction,'' such as commissions, that are specific to, and paid solely in connection with, the transaction. The Bureau believes that, if Congress intended the prohibitions on dual compensation to apply to salary or hourly wages that are not tied to a specific transaction, Congress would have used the term ''compensation'' in TILA section 129B(c)(2), as it did in TILA section 129B(c)(1) that prohibits compensation based on loan terms. Thus, like current § 1026.36(d)(2), TILA section 129B(c)(2) prohibits a mortgage originator that receives compensation directly from the consumer in a closed-end consumer credit transaction secured by a dwelling from receiving compensation, directly or indirectly, from any person other than the consumer in connection with the transaction.

Nonetheless, TILA section 129B(c)(2) does not restrict a mortgage originator from receiving payments from a person other than the consumer for bona fide third-party charges not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator, even if the mortgage originator receives compensation directly from the consumer. For example, assume that a loan originator receives compensation directly from a consumer in a transaction. TILA section 129B(c)(2) does not restrict the loan originator from receiving payment from a person other than the consumer (*e.g.,* a creditor) for bona fide and reasonable charges, such as credit reports, where those amounts are not retained by the loan originator but are paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. Because the loan originator does not retain such charges, they are not considered part of the loan originator's compensation for purposes of § 1026.36(d).

Consistent with TILA section 129B(c)(2) and pursuant to the Bureau's authority under TILA section 105(a) to effectuate the purposes of TILA and facilitate compliance with TILA, as discussed in more detail in the section-by-section analysis to proposed § 1026.36(a), the Bureau proposes to amend comment 36(d)(1)–1.iii (re-designated as proposed comment 36(a)–5.iii) to clarify that the term ''compensation'' does not include amounts a loan originator receives as payment for bona fide and reasonable charges, such as credit reports, where those amounts are not retained by the loan originator but are paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. Thus, under proposed § 1026.36(d)(2)(i) and comment 36(a)–5.iii, a loan originator that receives compensation directly from a consumer could receive a payment from a person other than the consumer for bona fide and reasonable charges where those amounts are not retained by the loan originator but are paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. For example, assume a loan originator receives compensation directly from a consumer in a transaction. Further assume the loan originator charges the consumer $25 for a credit report provided by a third party that is not the creditor, its affiliates or the affiliate of the loan originator, and this fee is bona fide and reasonable. Assume also that the $25 for the credit report is paid by the creditor with proceeds from a rebate. The loan originator in that transaction is not prohibited by proposed § 1026.36(d)(2)(i) from receiving the $25 from the creditor, even though the consumer paid compensation to the loan originator in the transaction.

In addition, a loan originator that receives compensation in connection with a transaction from a person other than the consumer could receive a payment from the consumer for a bona fide and reasonable charge where the amount of that charge is not retained by the loan originator but is paid to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. For example, assume a loan originator receives compensation in connection with a transaction from a creditor. Further assume the loan originator charges the consumer $25 for a credit report provided by a third party that is not the creditor, its affiliates or the affiliate of the loan originator, and this fee is bona fide and reasonable. Assume the $25 for the credit report is paid by the consumer. The loan originator in that transaction is not prohibited by proposed § 1026.36(d)(2)(i) from receiving the $25 from the consumer, even though the creditor paid compensation to the loan originator in connection with the transaction.

As discussed in more detail in the section-by-section analysis to proposed § 1026.36(a), proposed comment 36(a)–5.iii also recognizes that, in some cases, amounts received for payment for such third-party charges may exceed the

actual charge because, for example, the originator cannot determine precisely what the actual charge will be before consummation. In such a case, under proposed comment 36(a)–5.iii, the difference retained by the originator would not be deemed compensation if the third-party charge collected from the consumer or a person other than the consumer was bona fide and reasonable, and also complies with State and other applicable law. On the other hand, if the originator marks up a third-party charge (a practice known as ''upcharging''), and the originator retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36(d) and (e). Proposed comment 36(a)–5.iii contains two illustrations, which are discussed in more detail in the section-by-section analysis to proposed § 1026.36(a).

If any loan originator receives compensation directly from the consumer, no other loan originator may receive compensation in connection with the transaction. Under current § 1026.36(d)(2), if any loan originator is paid compensation directly by the consumer in a transaction, no other loan originator may receive compensation in connection with the transaction from a person other than the consumer. For example, assume that a loan originator organization receives compensation directly from the consumer in a mortgage transaction subject to § 1026.36(d)(2). The loan originator organization may not receive compensation in connection with the transaction (*e.g.,* a commission) from a person other than the consumer (*e.g.,* the creditor). In addition, the loan originator organization may not pay individual loan originators any transaction-specific compensation, such as commissions, in connection with that particular transaction. Nonetheless, the loan originator organization could pay individual loan originators a salary or hourly wage or other compensation that is not tied to the particular transaction. *See* current comment 36(d)(2)–1. In addition, a person other than the consumer (*e.g.,* the creditor) may not pay compensation in connection with the transaction to any loan originator, such as a loan originator that is employed by the creditor or by the loan originator organization.

TILA section 129B(c)(2), which was added by section 1403 of the Dodd-Frank Act, generally is consistent with the above prohibition in current § 1026.36(d)(2) (re-designated as proposed § 1026.36(d)(2)(i)). 12 U.S.C. 1639b(c)(2). TILA section 129B(c)(2)(B) prohibits a loan originator organization that receives compensation directly from a consumer in a transaction from paying compensation tied to the transaction (such as a commission) to individual loan originators. Specifically, TILA section 129B(c)(2)(B) provides that a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if: (1) The mortgage originator does not receive any compensation directly from the consumer; and (2) ''the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator).'' The individual loan originator is the one that is receiving compensation from a person other than the consumer, namely the loan originator organization. Thus, TILA section 129B(c)(2)(B) permits the individual loan originator to receive compensation tied to the transaction from the loan originator organization if (1) the individual loan originator does not receive any compensation directly from the consumer and (2) the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the individual loan originator, creditor, or an affiliate of the creditor or originator). The individual loan originator is not deemed to be receiving compensation in connection with the transaction from a consumer simply because the loan originator organization is receiving compensation from the consumer in connection with the transaction. The loan originator organization and the individual loan originator are separate persons. Nonetheless, the consumer is making ''an upfront payment of discount points, origination points, or fees'' in the transaction when it pays the loan originator organization compensation. The payment of the origination point or fee by the consumer to the loan originator organization is not a bona fide third-party charge under TILA section 129B(c)(2)(B)(ii). Thus, because the loan originator organization has received an upfront payment of origination points or fees from the consumer in the transaction, unless the Bureau exercises its exemption authority as discussed in more detail below, no loan originator (including an individual loan originator) may receive compensation tied to the transaction from a person other than the consumer.

Nonetheless, TILA section 129B(c)(2)(B) also provides the Bureau authority to waive or create exemptions from this prohibition on consumers paying upfront discount points, origination points or fees, where doing so is in the interest of consumers and the public. Pursuant to this waiver/exemption authority, the Bureau proposes to add § 1026.36(d)(2)(i)(C) to provide that, if a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator entity may pay compensation to individual loan originators, and the individual loan originators may receive compensation from the loan originator organization. The Bureau also proposes to amend comment 36(d)(2)–1 (re-designated as proposed comment 36(d)(2)(i)–1) to be consistent with proposed § 1026.36(d)(2)(i)(C). For the reasons discussed below, the Bureau believes that it is in the interest of consumers and the public to allow a loan originator organization to pay individual loan originators compensation in connection with the transaction, even when the loan originator organization has received compensation in connection with the transaction directly from the consumer.

The Bureau believes that the risk of harm to consumers that the current restriction was intended to address is likely no longer present, in light of new TILA provision 129B(c)(1). Under current § 1026.36(d)(1)(iii), compensation paid directly by a consumer to a loan originator could be based on loan terms and conditions. Thus, if a loan originator organization were allowed to pay an individual loan originator that works for the organization a commission in connection with a transaction, the individual loan originator could possibly steer the consumer into a loan with terms and conditions that would produce greater compensation to the loan originator organization, and the individual loan originator, because of this steering, could receive greater compensation if he or she were allowed to receive compensation in connection with the transaction. However, the risk is now expressly addressed by the Dodd-Frank Act. Specifically, TILA section 129B(c)(1), as added by section 1403 of the Dodd-Frank Act, prohibits compensation based on loan terms, even when a consumer is paying compensation directly to a mortgage originator. 12 U.S.C. 1639b(c)(1). Thus, pursuant to TILA section 129B(c)(1), and under proposed § 1026.36(d)(1), even if an individual loan originator is

permitted to receive compensation in connection with the transaction from the loan originator organization where the loan originator organization receives compensation directly from the consumer, the amount of the compensation paid by the consumer to the loan originator organization, and the amount of the compensation paid by the loan originator organization to the individual loan originator, cannot be based on loan terms. In outreach with consumer groups, these groups agreed that loan origination organizations that receive compensation directly from a consumer in a transaction should be permitted to pay individual loan originators that work for the organization compensation in connection with the transaction.

The Bureau believes that it is in the interest of consumers and the public to allow loan originator organizations to pay compensation in connection with the transaction to individual loan originators, even when the loan originator organization is receiving compensation directly from the consumer. As discussed above, the Bureau believes the risk of the harm to the consumer that the restriction was intended to address has been remedied by the statutory amendment prohibiting even compensation that is paid by the consumer from being based on the transaction's terms. With that protection in place, allowing this type of compensation to the individual loan originator no longer presents the same risk to the consumer of being steered into a transaction involving direct compensation from the consumer because both the loan originator organization and the individual loan originator can realize greater compensation. In addition, with this proposed revision, more loan originator organizations may be willing to structure transactions where consumers pay loan originator compensation directly. The Bureau believes that this result will enhance the interests of consumers and the public by giving consumers greater flexibility in structuring the payment of loan originator compensation. In a transaction where the consumer pays compensation directly to the loan originator, the amount of the compensation may be more transparent to the consumer. In addition, in these transactions, the consumer may have more flexibility to choose the pricing of the loan. Subject to proposed § 1026.36(d)(2)(ii), as discussed in more detail below, in transactions where the consumer pays compensation directly to the loan originator, the consumer would know the amount of the loan originator compensation and could pay all of that compensation upfront, rather than the creditor determining the compensation and recovering the cost of that compensation from the consumer through the rate, or a combination of the rate and upfront origination points or fees.

36(d)(2)(ii) Restrictions on Discount Points and Origination Points or Fees

Background

As discussed above, under current § 1026.36(d)(2), a person other than the consumer (*e.g.,* a creditor) is not prohibited from paying compensation to any loan originator in connection with a transaction, so long as no loan originator has received compensation directly from the consumer in that transaction. Loan originator organizations typically are the only loan originators that receive compensation directly from the consumer in a transaction. Individual loan originators that work for a loan originator organization typically are prohibited by applicable law and by the loan originator organization from receiving compensation directly from the consumer. Thus, in the typical transaction that involves a loan originator organization, under § 1026.36(d)(2), a creditor is not prohibited from paying compensation in connection with a transaction (*e.g.,* commission) to a loan originator organization and the loan originator organization is not prohibited from paying compensation in connection with the transaction to individual loan originators, so long as the loan originator organization has not received compensation directly from the consumer in that transaction. In addition, in a transaction that does not involve a loan originator organization, a creditor is not prohibited under § 1026.36(d)(2) from paying compensation in connection with a transaction to individual loan originators that work for the creditor, so long as the individual loan originators have not received compensation directly from the consumer in that transaction, which they are generally prohibited from doing by the creditor pursuant to safety and soundness regulation.

Also, if a creditor is paying compensation in connection with a transaction to a loan originator organization or to individual loan originators that work for the creditor, as described above, current § 1026.36(d)(2) does not prohibit the creditor from collecting discount points or origination points or fees from the consumer in the transaction. For example, current § 1026.36(d)(2) does not limit a creditor's ability to charge the consumer origination points or fees which the consumer would pay in cash or out of the loan proceeds at or before closing as a means for the creditor to collect the loan originator's compensation or other costs. In addition, current § 1026.36(d)(2) does not limit a creditor's ability to offer a lower interest rate in a transaction in exchange for the consumer paying discount points.

The Dodd-Frank Act

New TILA section 129B(c)(2), which was added by section 1403 of the Dodd-Frank Act, restricts the ability of a creditor, the mortgage originator, or the affiliates of either to collect from the consumer upfront discount points, origination points, or fees in a transaction. 12 U.S.C. 1639b(c)(2). Specifically, TILA section 129B(c)(2)(B) provides that a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if: (1) the mortgage originator does not receive any compensation directly from the consumer; and (2) ''the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator).'' TILA section 129B(c)(2)(B)(ii) also provides the Bureau authority to waive or create exemptions from this prohibition on consumers paying upfront discount points, origination points, or fees, where doing so is in the interest of consumers and the public interest.

As discussed in more detail in the section-by-section analysis to proposed § 1026.36(d)(2)(i), the Bureau interprets the phrase ''origination fee or charge'' as used in new TILA section 129B(c)(2) more narrowly than compensation as used in TILA section 129B(c)(1) and to mean compensation that is paid ''in connection with the transaction,'' such as commissions, that are specific to, and paid solely in connection with, the transaction. Thus, under TILA section 129B(c)(2), for a transaction involving a loan originator organization, a creditor may pay compensation in connection with a transaction (*e.g.,* a commission) to the loan originator organization, and the loan originator organization may pay compensation in connection with a transaction to individual loan originators only if: (1) The loan originator organization does not receive compensation directly from the

consumer; and (2) the consumer does not make an upfront payment of discount points, origination points, or fees as discussed above.

In addition, the Bureau proposes to use its exemption authority in TILA section 129B(c)(2)(B)(ii) to permit a loan originator organization to pay compensation in connection with a transaction to individual loan originators, even if the loan originator organization received compensation directly from the consumer. Assume a transaction where a loan originator organization receives compensation directly from the consumer. As discussed in more detail in the section-by-section analysis to proposed § 1026.36(d)(2)(i), TILA section 129B(c)(2) prohibits the loan originator organization from paying compensation tied to a transaction (such as commission) to an individual loan originator unless: (1) The individual loan originator does not receive compensation directly from the consumer; and (2) the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the individual loan originator, creditor, or an affiliate of the creditor or originator). An individual loan originator is not deemed to be receiving compensation in connection with a transaction from a consumer simply because the loan originator organization is receiving compensation from the consumer in connection with the transaction. The loan originator organization and the individual loan originator are separate persons. Nonetheless, the consumer makes ''an upfront payment of discount points, origination points, or fees'' in the transaction when the loan originator organization is paid compensation by the consumer. The payment of the origination points or fees by the consumer to the loan originator organization is not considered a bona fide third-party charge under TILA section 129B(c)(2)(B)(ii). Thus, because the loan originator organization has received an upfront payment of origination points or fees from the consumer in the transaction, unless the Bureau exercises its exemption authority, no loan originator (including an individual loan originator) could receive compensation tied to the transaction from a person other than the consumer.[62]

Likewise, under TILA section 129B(c)(2), for a transaction not involving a loan originator organization, unless the Bureau exercises its exemption authority, a creditor may pay compensation in connection with a transaction to individual loan originators, such as the creditor's employees, only if: (1) These individual loan originators do not receive compensation directly from the consumer, which they are generally prohibited from doing by the creditor pursuant to safety and soundness regulation; and (2) the consumer does not make an upfront payment of discount points, origination points, or fees as discussed above. As a result, under TILA section 129B(c)(2), if a consumer pays discount points, origination points, or fees to a creditor, the creditor cannot pay compensation in connection with the transaction (*e.g.,* a commission) to individual loan originators that work for the creditor. However, the restrictions in TILA section 129B(c)(2) do not apply if a creditor does not pay compensation to individual loan originators that is not tied to a particular transaction. For example, if a creditor pays to individual loan originators only a salary or hourly wage, the restriction on the consumer paying discount points, origination points, or fees in the transaction as set forth in TILA section 129B(c)(2)(B)(ii) would not apply. In this case, the creditor and its affiliates could collect discount points, origination points, or fees, as described in TILA section 129B(c)(2)(B)(ii), from the consumer.

To summarize, the prohibition in TILA section 129B(c)(2)(B)(ii) on the consumer paying upfront discount points, origination points, or fees in a transaction generally applies in three scenarios: (1) The creditor pays compensation in connection with the transaction (*e.g.,* a commission) to individual loan originators, such as the creditor's employees; (2) the creditor pays a loan originator organization compensation in connection with a transaction, regardless of how the loan originator organization pays compensation to individual loan originators; and (3) the loan originator organization receives compensation directly from the consumer in a transaction and pays individual loan originators compensation in connection with the transaction. The prohibition in TILA section 129B(c)(2)(B)(ii) on the consumer paying upfront discount points, origination points, or fees in a transaction generally does not apply in the following two scenarios: (1) The creditor pays individual loan originators, such as the creditor's employees, only in the form of a salary, hourly wage or other compensation that is not tied to the particular transaction; and (2) the loan originator organization receives compensation directly from the consumer in a transaction and pays individual loan originators that work for the organization only in the form of a salary, hourly wage, or other compensation that is not tied to the particular transaction. The Bureau understands, however, that in most transactions, creditors and loan originator organizations pay individual loan originators compensation tied to a particular transaction (such as a commission). Thus, the Bureau expects that the restrictions in new TILA section 129B(c)(2)(B)(ii) will apply to most mortgage transactions except to the extent that the Bureau exercises its exemption authority as discussed below.

The Bureau's Proposal

The Bureau is proposing to implement the statutory provisions addressing the prohibition on the upfront payment by the consumer of discount points, origination points, or fees as set forth in TILA section 129B(c)(2)(B)(ii) by using its exemption authority provided in that same section. Specifically, the Bureau proposes to use its exemption authority set forth in TILA section 129B(c)(2)(B)(ii), which provides the Bureau authority to waive or create exemptions from the prohibition on consumers' paying upfront discount points, origination points, or fees, where doing so is in the interest of consumers and the public.

As discussed in more detail below, the Bureau proposes in new § 1026.36(d)(2)(ii)(A) restrictions on discount points and origination points or fees in a closed-end consumer credit transaction secured by a dwelling, if any loan originator will receive from any person other than the consumer compensation in connection with the transaction. Specifically, in these transactions, a creditor or loan originator organization may not impose on the consumer any discount points and origination points or fees in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees; the creditor need not make available the

[62] The Bureau notes that the restrictions in TILA section 129B(c)(2) do not apply in transactions where a loan originator organization receives compensation directly from the consumer and the loan originator organization does not pay individual loan originators compensation (such as a commission) in connection with the transaction. In these cases, TILA section 129(B)(c)(2) is not violated because no loan originator is receiving compensation in connection with a transaction from a person other than the consumer.

alternative, comparable loan, however, if the consumer is unlikely to qualify for such a loan. The term ''comparable'' means equal or equivalent. Thus, the term ''comparable, alternative loan'' would mean that the two loans must have the same terms and conditions, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such as the amount of the regular periodic payments), and the amount of any discount points and origination points or fees.

Under the proposal, a creditor would not be required to provide all consumers the option of a comparable, alternative loan that does not include discount points and origination points or fees. If the creditor determines that a consumer is unlikely to qualify for a comparable, alternative loan that does not include discount points and origination points or fees, the creditor is not required to make such a loan available to the consumer.

The Bureau notes that under § 1026.36(d)(3), affiliates are treated as a single ''person.'' Thus, affiliates of the creditor and the loan originator organization also could not impose on the consumer any discount points and origination points or fees in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees, except that the creditor need not make available the alternative, comparable loan if the consumer is unlikely to qualify for such a loan. *See* proposed comment 36(d)(2)(ii)–3. The proposal also makes clear that proposed § 1026.36(d)(2)(ii) does not override any of the prohibitions on dual compensation set forth in proposed § 1026.36(d)(2)(i), as discussed above. For example, § 1026.36(d)(2)(ii) does not permit a loan originator organization to receive compensation in connection with a transaction both from a consumer and from a person other than the consumer. *See* proposed comment 36(d)(2)(ii)–1.iii.

The proposal also provides that no discount points and origination points or fees may be imposed on the consumer in connection with a transaction subject to proposed § 1026.36(d)(2)(ii)(A) unless there is a bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). In addition, for any rebate paid by the creditor that will be applied to reduce the consumer's settlement charges, the creditor must provide a bona fide rebate in return for an increase in the interest rate compared to the interest rate for the loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). As discussed in more detail below, the Bureau has evaluated three primary types of approaches to implement a requirement that the trade-off be ''bona fide.''

As described in more detail below, the Bureau proposes in new § 1026.36(d)(2)(ii)(B) to define the term ''discount points and origination points or fees'' for purposes of § 1026.36(d) and (e) to include all items that would be included in the finance charge under § 1026.4(a) and (b), and any fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2), that are payable at or before consummation by the consumer to a creditor or a loan originator organization, except for: (1) Interest, including per-diem interest; (2) any bona fide and reasonable third-party charges not retained by the creditor or loan originator organization; and (3) seller's points and premiums for property insurance that are excluded from the finance charge under § 1026.4(c)(5), and (d)(2), respectively. Under the proposal, the phrase ''payable at or before consummation by the consumer to a creditor or a loan originator organization'' would include amounts paid by the consumer in cash at or before closing or financed and paid out of the loan proceeds.

The Bureau notes that the proposal does not contain two potential restrictions that were discussed as part of the Small Business Review Panel process. First, the proposal does not contain a provision that would ban origination points and prevent origination fees from varying based on loan size. By and large, SERs were strongly opposed to the requirement that origination fees do not vary with the size of loan. SERs' opposition to the flat fee requirement was based on the view that the costs of origination varied for loans with different characteristics, such as geography and loan type, and GSE-imposed loan level pricing adjustments vary by loan size. In addition, SERs stated that the imposition of the flat fee requirement would disproportionately harm small lenders and would be regressive because borrowers with smaller loan amounts would be charged more than they are typically charged currently. The Bureau believes that the provisions set forth in this proposal accomplish a similar purpose as the flat fee requirement, namely to ensure that consumers are in the position to shop and receive value for origination points or fees, but does so in a way to minimize adverse consequences for industry and consumers that the flat fee requirement might entail.

Second, the proposal does not contain a provision that would ''sunset'' the proposed exemptions from the statutory restrictions on consumers' upfront payment of discount points, origination points, or fees. As detailed in the Small Business Review Panel Report, the Bureau had considered a sunset provision whereby, after a specified period (*e.g.,* three or five years), the proposed rule permitting creditors and loan originator organizations in certain circumstances to impose upfront discount points and origination points or fees on consumers would automatically expire (and the default prohibition would take full effect) unless the Bureau takes affirmative action to extend it. At that time, the Bureau would have had time to conduct a more detailed assessment of the payment of discount points and origination points or fees in a more stable regulatory environment to determine the long-term regulatory regime that would maximize consumer protections and credit availability. As part of the Small Business Review Panel process, the Bureau also noted that with or without a sunset provision, the Bureau would review the regulation within five years of its effective date pursuant to section 1022(d) of the Dodd-Frank Act, which requires the Bureau to ''conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law'' and publish a report of its assessment. 12 U.S.C. 5512(d). The assessment must address, among other relevant factors, the effectiveness of the rule or order in meeting the Dodd-Frank Act's purposes and objectives and the specific goals stated by the Bureau, and it must reflect any available evidence and data collected by the Bureau. Before publishing a report of its assessment, the Bureau is required to invite public comment on recommendations for modifying, expanding, or eliminating the newly adopted significant rule or order.

SERs generally preferred the Bureau to follow its Dodd-Frank-Act requirement to review the impact of whatever regulation is adopted after five years instead of adopting an automatic sunset. The SERs believed an automatic sunset could be disruptive to the market.

To minimize potential disruption to the market, the Bureau is not proposing the ''sunset'' provision. The Bureau believes that the review it must conduct within five years of the rule's effective date pursuant to section 1022(d) of the Dodd-Frank Act is the appropriate method to continue to assess the impact of the rule. If the Bureau finds through this review that changes in the rule may be needed, the Bureau could make changes to the rule with notice and comment as appropriate. Nonetheless, the Bureau solicits comment on whether such as ''sunset'' provision would be beneficial.

Use of the Bureau's exemption authority. Unlike TILA section 129B(c)(2)(B)(ii), the Bureau's proposal would permit consumers in certain circumstances to pay upfront discount points and origination points or fees in transactions where any loan originator receives compensation in connection with the transaction from a person other than the consumer. Pursuant to the exemption authority set forth in TILA section 129B(c)(2)(B)(ii), the Bureau believes that it is ''in the interest of consumers and the public interest'' to permit discount points and origination points or fees to be charged on loans in certain instances.

The Bureau believes that the proposal may benefit consumers and the public by providing consumers the flexibility to decide whether to pay discount points and origination points or fees. The Bureau believes that permitting creditors to offer consumers the option to choose to pay discount points and origination points or fees may benefit consumers by giving them additional options in choosing a loan product that fits their needs.

Some mortgage consumers may want the lowest rate possible on their loans. In addition, some mortgage customers may prefer to lower the future monthly payment on the loan below some threshold amount, and paying discount points and origination points or fees would allow consumers to achieve this lower monthly payment by reducing the interest rate. In addition, some consumers may need to pay discount points and origination points or fees to reduce the monthly payment on the loan so that they can qualify for the loan. Without the ability to pay discount points and origination points or fees to reduce the monthly payment, the interest rate and the monthly payments on the loan that does not include discount points and origination points or fees may be too high for the consumer to qualify for the loan.

A consumer could achieve a lower monthly payment by making a bigger down payment and thus reducing the loan amount. Nonetheless, it may be difficult for consumers to use this option to reduce significantly the monthly payment because it might take a significant increase in the down payment to achieve the desired reduction in the monthly payment. In other words, if the consumer took the same money that he or she would pay in discount points and origination points or fees and made a bigger down payment to reduce the loan amount, the consumer may not gain as large of a reduction in the monthly payment as if the consumer used that money to pay discount points and origination points or fees to reduce the interest rate. Some consumers may also obtain a tax benefit by paying discount points that applying such funds to a down payment would not achieve.

Having the option to pay discount points and origination points or fees also allows consumers to determine whether they can best lower the overall costs of the mortgage loan by paying discount points and origination points or fees upfront in exchange for a lower interest rate. There will be a specific point in the timeline of the loan where the money spent to buy down the interest rate will be equal to the money saved by making reduced loan payments resulting from the lower interest rate on the loan. Selling the property or refinancing prior to this break-even point will result in a net financial loss for the consumer, while keeping the loan for longer than this break-even point will result in a net financial savings for the consumer. The longer a consumer keeps the same credit extension in place, the more the money spent on the discount points and origination points or fees will pay off. The Bureau believes consumers will be benefited by retaining the option to make these evaluations based upon their assessment of the costs and benefits, as well as their future plans.

On the other hand, some consumers may prefer not to pay discount points and origination points or fees. For example, some consumers may not have the cash to pay discount points and origination points or fees before or at closing, and may wish not to finance such fees or have insufficient equity available to do so. In addition, some consumers may contemplate selling the home or refinancing the mortgage within a short period of time and may believe that it is not in their best interests to pay discount points and origination points or fees upfront in exchange for a lower interest rate.

The Bureau is proposing to structure the use of its exemption authority to leverage the benefits that would arise if creditors were limited to making loans that do not include discount points and origination points or fees while preserving consumers' ability to choose another loan when appropriate. Through the proposal, the Bureau hopes to advance two objectives to address the problems in the current mortgage market that the Bureau believes the prohibition on discount points and origination points or fees was designed to address: (1) To facilitate consumer shopping by enhancing the ability of consumers to make comparisons using loans that do not include discount points and origination points or fees available from different creditors as a basis for comparison; and (2) to enhance consumer decisionmaking by facilitating a consumer's ability to understand and make meaningful trade-offs on loans available from a particular creditor of paying discount points and origination points or fees in exchange for a higher interest rate. In addition, the Bureau is considering whether to adopt additional safeguards to ensure consumers who make upfront payments of discount points and origination points or fees receive value in return.

Making available a loan that does not include discount points and origination points or fees. Under the proposal, a creditor would be required to make available to a consumer a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. To ensure that consumers are informed of the option to choose such a loan from the creditor that does not include discount points and origination points or fees, the proposal would provide guidance on what it means for the creditor to make such a loan available. Specifically, the proposal would provide that, in a retail transaction, a creditor would be deemed to have made that loan available if any time the creditor gives an oral or written quote specific to the consumer of the interest rate, regular periodic payments, the total discount points and origination points or fees, or the total closing costs for a loan that includes discount points and origination points or fees, the creditor also provides a quote for those same types of information for the comparable, alternative loan that does not include discount points and origination points or fees. The term ''comparable, alternative loan'' would mean that the two loans for which quotes are provided must have the same terms and conditions, other than the interest rate, any terms that change solely as a result of the change in the

interest rate (such as the amount of regular periodic payments), and the amount of any discount points and origination points or fees.

The quote for the loan that does not include discount points and origination points or fees would need to be given only if the quote for the loan that includes discount points and origination points or fees is given prior to when the consumer receives the Good Faith Estimate (required under RESPA). The requirement to provide a quote for a loan that does not include discount points or origination points or fees would also not apply to any disclosures required by TILA or RESPA on loans that include discount points or origination points or fees. The Bureau believes that consumers generally ask for, and are provided, quotes from creditors prior to application. However, as discussed below, the Bureau is inviting comments as to whether the requirement to provide an alternative quote should apply in conjunction with the Loan Estimate, as proposed in the TILA–RESPA Integration Proposal.

Under the proposal, a creditor using this safe harbor is required to provide information about the loan that does not include discount points and origination points or fees only when the information about the loan that includes discount points or origination points or fees is specific to the consumer. Advertisements would not be subject to this requirement. *See* comment 2(a)(2)–1.ii.A. If the information about the loan that includes discount points or origination points or fees is an advertisement under § 1026.24, the creditor is not required to provide the quote for the loan that does not include discount points and origination points or fees. For example, if prior to the consumer submitting an application, the creditor provides a consumer an estimated interest rate and monthly payment for a loan that includes discount points and origination points or fees, and the estimates were based on the estimated loan amount and the consumer's estimated credit score, then the creditor must also disclose the estimated interest rate and estimated monthly payment for the loan that does not include discount points and origination points or fees. In contrast, if the creditor provides the consumer with a preprinted list of available rates for different loan products that include discount points and origination points or fees, the creditor is not required to provide the information about the loans that do not include discount points and origination points or fees under this safe harbor. Nonetheless, as discussed in more detail below, the Bureau solicits comment on whether the advertising rules in § 1026.24(d) should be revised as well.

In addition, in a transaction that involves a loan originator organization, the creditor generally would be deemed to have made available the loan that does not include discount points and origination points or fees if the creditor communicates to the loan originator organization the pricing for all loans that do not include discount points and origination points or fees. Separately, mortgage brokers are prohibited under § 1026.36(e) from steering consumers into a loan solely to maximize the broker's commission. The rule sets forth a safe harbor for complying with provisions prohibiting steering if the broker presents to the consumer three loan options that are specified in the rule. One of these loan options is the loan with the lowest total dollar amount for discount points and origination points or fees. Thus, mortgage brokers that are using the safe harbor must present to the consumer the loan with the lowest interest rate that does not include discount points and origination points or fees. The Bureau believes that most mortgage brokers are using the safe harbor to comply with the provision prohibiting steering, so most consumers in transactions that involve mortgage brokers would be informed of the loan with the lowest interest rate that does not include discount points and origination points or fees.

As discussed above, under the proposal, a creditor is not required to make available a comparable, alternative loan if the consumer is unlikely to qualify for that loan. The Bureau solicits comment on whether consumers should be informed that they were not given information about a comparable, alternative loan because they were unlikely to qualify for that loan. For example, in transactions that do not involve a loan originator organization, should creditors be required either to make the comparable, alternative loan available to the consumer if the consumer likely qualifies for that loan or to inform consumers that the creditor is not making the comparable, alternative loan available because the consumer is unlikely to qualify for that loan? In transactions that involve a loan originator organization, should a loan originator organization using the safe harbor under § 1026.36(e) be required to disclose to a consumer that the loan originator organization did not present a loan that does not include discount points and origination points or fees because the consumer was unlikely to qualify for that loan from the creditors with whom the loan originator organization regularly does business? The Bureau specifically requests comment on whether it is useful to consumers to be informed that they were unlikely to qualify for the comparable, alternative loan.

The Bureau recognizes that creditors who do not wish to make loans that do not include discount points and origination points or fees available to particular consumers could possibly manipulate their underwriting standards so that those consumers do not qualify for such a loan. To prevent this practice, the Bureau is considering safeguards designed to prohibit creditors from changing their qualification standards, such as loan-to-value ratios and credit score requirements, solely for the purpose of disqualifying consumers from receiving loans that does not include discount points and origination points or fees. This alternative would make clear that creditors must make available the loan that does not include discount points and origination points or fees unless, as a result of the increased monthly payment resulting from the higher interest rate on the loan that does not include discount points and origination points or fees, the consumer cannot satisfy the creditor's underwriting rules. The Bureau invites comments on whether there is a risk that, absent such a requirement, some creditors might manipulate their underwriting standards and whether the Bureau should adopt a rule against doing so.

The Bureau recognizes, however, that even if underwriting standards could not be manipulated, creditors who do not want to make loans that do not include discount points and origination points or fees could set the interest rates high for certain consumers, which could increase the monthly payment on those loans to be high so that those consumers cannot satisfy the creditor's underwriting rules. Thus, the Bureau is considering another alternative, whereby a creditor would be able to make available a loan that includes discount points and origination points or fees only when the consumer also qualifies for a comparable, alternative loan that does not include discount points and origination points or fees. A potential advantage of this alternative is that it would effectively limit creditors' opportunity to manipulate their underwriting standards or charge above-market interest rates to prevent particular consumers from qualifying for a loan that does not include discount points and origination points or fees.

On the other hand, the Bureau is concerned that adoption of such an alternative may impact access to credit.

The Bureau recognizes that there are some creditors who will not make a loan where the debt-to-income ratio exceeds a certain level and that there may be some consumers for whom the difference between the interest rate on a loan that includes and does not include discount points and origination points or fees will determine whether the consumer can satisfy the creditor's debt-to-income standard. In that case, consumers who do not qualify for specific loans that do not include discount points and origination points or fees would not be able to receive from the creditor the same type of loans that include discount points and origination points or fees. This could harm those consumers who might prefer to obtain from a creditor a specific type of loan that includes discount points and origination points or fees, rather than not be able to obtain that type of loan at all from the creditor.

The Bureau specifically requests comment on credit availability issues of adopting such an alternative. For example, in some cases, a consumer may not qualify for the loan that does not include discount points and origination points or fees because the loan has a higher interest rate and the monthly payments on that loan will be too high for the consumer to qualify based on the debt-to-income ratio and other underwriting standards used by the creditor. The Bureau recognizes that this may be true even if the interest rate the creditor charges on the loan that does not include discount points and origination points or fees is a competitive market rate, and the creditor does not change its underwriting standards purposefully to prevent consumers from qualifying for the loan. The Bureau requests comment on how common it would be for this to occur, in which scenarios it would be more likely to occur, and what types of consumers would likely be affected.

In addition, in industry outreach meetings, some creditors expressed concern that the interest rate (and corresponding APR) that a creditor may need to charge a less-creditworthy consumer for a loan that does not include discount points and origination points or fees to make the loan profitable to the creditor could exceed the APR threshold set forth in the rules under § 1026.32 for high-cost mortgages (''high-cost mortgage rules'') and could make that loan a high-cost mortgage. These creditors also pointed out that there are State laws that have restrictions similar to the high-cost mortgage rules. Many creditors generally do not want to make loans that would be subject to the high-cost mortgage rules or similar State laws. If the alternative were adopted where a consumer must qualify for the comparable, alternative loan that does not include discount points and origination points or fees, the consumer could not obtain this specific type of loan from the creditor even though the creditor would be willing to make the consumer a comparable, alternative loan that includes discount points and origination points or fees because this loan would not trigger the high-cost mortgage rules or similar State laws. The Bureau does not currently have sufficient data to model the impact of the requirement for a creditor to make available a comparable, alternative loan that does not include discount points and origination points or fees on triggering the high-cost mortgage rules or similar State laws or to model the impact on credit availability to the extent that such rules or laws are triggered. The Bureau seeks data and comment on the potential triggering of the high-cost mortgage rule or similar State laws, the potential impact on credit availability, and potential modifications to the requirement to mitigate these effects.

Moreover, the Bureau is aware that certain State loan programs that permit creditors to charge origination points on the loans do not permit the option of charging a higher interest rate in lieu of charging the origination points. The Bureau requests additional comment on these types of State loan programs, how they work, how prevalent they are, the types of consumers these programs typically serve; and how common it is for creditors under these programs not to have the option of charging a higher interest rate.

Also, in outreach meetings, some creditors mentioned that, while creditors that sell loans in the secondary market typically can recover their origination costs through the premium paid through the sale of the loan for the higher interest rate, creditors that hold loans in portfolio do not have that option and would be required to recover the origination costs through a higher interest rate if the creditor cannot charge an upfront origination fee. Consumers with loan products with higher rates are more likely to refinance those loan products and thus a creditor that holds those loans in portfolio would have to use another approach to recover the costs to originate those loans. Thus, creditors that plan to hold a loan in portfolio may be more reluctant to make available to a consumer a loan that does not include discount points and origination points or fees. This may particularly affect small or specialty creditors that may be more likely to hold a sizable number of loans in portfolio. The Bureau requests comment on whether creditors currently make portfolio loans that do not include discount points and origination points or fees, and if so, how creditors typically manage the risk that such consumers will refinance the loans or sell the homes and repay the loans prior to the origination costs being recovered.

In addition, in outreach with industry, some creditors raised concerns that, even for creditors that sell loans into the secondary market, it may not possible for creditors in all cases to make available to all consumers a loan that does not include discount points and origination points or fees. These creditors indicated that in some cases it is possible that the premium paid in the secondary market for a loan will not be sufficient for the creditor to cover origination and other costs and to realize a profit. These creditors indicated that this may occur more often for smaller loans, or riskier loans (such as where the consumer's credit score is low and the loan-to-value ratio on the loan is high). These creditors indicated that the interest rates on these types of loans would likely be high, and the secondary market may not pay sufficient premiums for those loans even though they have a higher interest rate because secondary market investors would be concerned about prepayment risk. These creditors indicated that in these situations, creditors may not make loans that include discount points and origination points or fees available to consumers because they would be unwilling to make available, as required, a comparable, alternative loan that does not include discount points and origination points or fees.

The Bureau requests comment, however, on: (1) The circumstances, either currently or in the past, where creditors are unable to make available to consumers loans that do not include discount points and origination points or fees because the premiums received by the creditor on those loans are not sufficient to sell the loan into the secondary market, and (2) the characteristics of the types of loans and consumers affected in these circumstances. In addition, the Bureau requests comment on whether the secondary market is likely to adjust to create new securities to disperse risk, including prepayment risk, if the volume of loans with higher interest rates increases because more consumers are offered the option, and actually choose, not to pay discount points and origination points or fees.

The Bureau also solicits comment on whether, if the alternative were adopted where a consumer must qualify for the comparable, alternative loan that does not include discount points and origination points or fees, creditors should be required to inform a consumer that he or she is not being offered a loan that includes discount points and origination points or fees because the consumer does not qualify for the comparable, alternative loan that does not include discount points and origination points or fees.[63] The Bureau solicits comment on whether it would be useful or beneficial to consumers to be informed that they did not qualify in these circumstances. The Bureau also solicits comment on, if such notification would be useful or beneficial, what form such a notice should take.

Facilitating consumer shopping. Through the proposal, the Bureau intends to facilitate consumer shopping by enhancing the ability of consumers to make comparisons using loans that do not include discount points and origination points or fees made available by different creditors as a basis for comparison. As discussed above, for retail transactions, a creditor will be deemed to be making the loan available if, any time the creditor provides a quote specific to the consumer for a loan that includes discount points and origination points or fees, the creditor also provides a quote for a comparable, alternative loan that does not include discount points and origination points or fees (unless the consumer is unlikely to qualify for the loan). Nonetheless, the Bureau is concerned that by the time a consumer receives a quote from a particular creditor for a loan that does not include discount points and origination points or fees, the consumer may have already completed his or her shopping in comparing loans from different creditors.

Thus, the Bureau solicits comment on whether the advertising rules in § 1026.24(d) should be revised to enable consumers to make comparisons using loans that does not include discount points and origination points or fees made available by different creditors as a basis for comparison. Currently, under § 1026.24(d), if an advertisement includes a ''trigger term,'' the advertisement must contain certain other information described in § 1026.24(d). The ''trigger terms'' set forth in § 1026.24(d)(1) are: (1) The amount or percentage of any downpayment; (2) the number of payments or period of repayment; (3) the amount of any payment; and (4) the amount of any finance charge (which includes the interest rate). Currently, under § 1024(d)(2), if one or more of these trigger terms are set forth in such an advertisement, the following information (''triggered terms'') must also be contained in the advertisement: (1) The amount or percentage of the downpayment; (2) the terms of repayment, which reflect the repayment obligations over the full terms of the loan, including any balloon payment; and (3) the ''annual percentage rate,'' using that term and, if the rate may be increased after consummation, that fact.[64] Thus, currently under § 1026.24(d)(2), if a creditor includes in an advertisement the interest rate that applies to a loan that includes discount points and origination points or fees, the creditor must include in that advertisement the following terms related to that loan: (1) The amount or percentage of the downpayment; (2) the terms of repayment, which reflect the repayment obligations over the full terms of the loan, including any balloon payment; and (3) the ''annual percentage rate,'' using that term and, if the rate may be increased after consummation, that fact. Currently, under § 1024(d)(2), a creditor may use an example of one or more typical extensions of credit with a statement of all the terms described above applicable to each example.

The Bureau solicits comment on whether the creditor in such an advertisement that contains the interest rate for a loan that includes discount points and origination points or fees also must contain the following information for the comparable, alternative loan that does not include discount points and origination points or fees: (1) The interest rate; and (2) the amount or percentage of the downpayment; (3) the terms of repayment, which reflect the repayment obligations over the full terms of the loan, including any balloon payment; and (4) the ''annual percentage rate,'' using that term and, if the rate may be increased after consummation, that fact. The Bureau solicits comment on whether this information about the loan that does not include discount points and origination points or fees must be equally prominent in the advertisement as the information about the loan that includes discount points and origination points or fees. The Bureau expects that the other rules set forth in § 1026.24 (such as the special rules applicable to catalog advertisements, and radio and television advertisements) would apply to this additional information about the loan that does not include discount points and origination points or fees, as applicable, in the same way that it applies to the information that is provided for the loan that includes discount points and origination points or fees. For example, in radio and television advertisements where the creditor discloses an interest rate for a loan that includes discount points and origination points or fees, a creditor is given the option (1) to comply with the rules in § 1026.24(d), as described above; or (2) to state the ''annual percentage rate,'' using that term and, if the rate may be increased after consummation, that fact and to list a toll-free telephone number that may be used by consumers to obtain additional cost information. See § 1026.24(g). The Bureau expects that a similar alternative method of disclosure would apply to the information that must be provided for the comparable, alternative loan that does not include discount points and origination points or fees.

The Bureau solicits comment on whether § 1026.24 should be revised, as discussed above, to require that a creditor that provides in an advertisement the interest rate for a loan that includes discount points and origination points or fees to include in such advertisement certain information for a comparable, alternative loan that does not include discount points and origination points or fees. The Bureau specifically solicits comment on whether this information would be useful to consumers that are interested in loans that do not include discount points and origination points or fees to compare such loans available from different creditors.

Consumers may find it easier to compare the loan pricing on loans that do not include discount points and origination points or fees available from different creditors because most of the cost of the loans would be incorporated into the interest rate. A consumer could compare the interest rates on such loans available from different creditors, without having to consider a variety of different discount points and origination points or fees that might be charged on each loan.

The Bureau recognizes that new TILA section 129B(c)(2)(B)(ii), and this

[63] The Bureau notes that in these circumstances, a creditor would not be required to provide an adverse action notice to the consumer under the Bureau's Regulation B, 12 CFR part 1002, which implements the Equal Credit Opportunity Act, because the creditor's denial of the loan that includes discount points and origination points or fees would be required by law. *See* 12 CFR. 1002.2(c).

[64] Section 1026.24(g) provides an alternative disclosure method for television and radio advertisements.

proposal in its definition of discount points and origination points or fees, treats charges differently based on whether they are paid to the creditor, loan originator organization, or the affiliates of either, or paid to an unaffiliated third party. Concerns have been raised that these advertising rules (and the quotes discussed above) may not effectively enable consumers to shop among multiple different creditors. If a consumer is comparing two loan products with no discount points and origination points or fees from different creditors, it may be difficult for the consumer to compare the two interest rates because the interest rate that is available from each creditor may depend at least in part on whether certain services, such as appraisal or lender's title insurance, are performed by the creditor, the loan originator organization, or affiliates of either, or whether they are performed by an unaffiliated third party. For example, if for one creditor the creditor's title insurance services will be performed by the creditor's affiliate while for another creditor these services will be performed by a third party, the interest rate available on the loan that does not include discount points and origination points or fees is likely to be higher for the first creditor than the interest rate available from the second creditor because the first creditor may not collect the cost of the title insurance from the consumer in cash at or before closing or through the loan proceeds but instead may collect those costs from the consumer through a higher rate.

The Bureau potentially could address this inconsistent treatment of third-party charges by providing that certain third-party charges are always excluded from discount points and origination points or fees, even when they are payable to an affiliate of the creditor or a loan originator organization. Nonetheless, even if payments for certain services were consistently excluded from the definition of discount points and origination points or fees, the consumer still may need to consider the amount of such closing costs in comparing alternative transactions. Consistently excluding certain services from the definition of discount points and origination points or fees may make it easier for a consumer to compare the interest rates on loan products available from different creditors if (1) the total amount of the closing costs that are not incorporated into the interest rate generally remains similar among different creditors; or (2) consumers have the ability to hold these costs constant by shopping for these services.

The Bureau requests comment on the scope of the definition of discount points and origination points or fees.

The Bureau also requests comment on ways to revise the definition of discount points and origination points or fees to facilitate consumers' ability to compare alternative loans that do not include discount points and origination points or fees from different creditors. In particular, the Bureau solicits comment on whether it should exempt from the definition of discount points and origination points or fees any fees imposed for lender's title insurance, regardless of whether this service is provided by the creditor, the loan originator organization, or the affiliates of either or is provided by an unaffiliated third party, so long as the fees are bona fide and reasonable. The Bureau understands that the cost of lender's title insurance can be a significant portion of a mortgage loan's total closing costs. Thus, excluding this cost from being incorporated into the rate for the loan that does not include discount points and origination points or fees, regardless of what party provides the service, may help produce interest rates that are more comparable across different creditors. In addition, the Bureau believes that, because the cost of lender's title insurance often is regulated by the States, the cost may remain constant from creditor to creditor. Accordingly, excluding lender's title coverage from the definition of discount points and origination points or fees in all cases may increase the ease with which consumers can shop among multiple creditors using the interest rate that does not include discount points and origination points or fees as a means of comparison. The Bureau also solicits comment on whether this same reasoning may be applicable for other types of insurance, assuming those costs also generally are regulated by the States.

The Bureau also recognizes that there may be other services that might be performed either by the creditor, the loan originator organization, or affiliates of either, or by an unaffiliated third party. For example, such services may include appraisal, credit reporting, property inspections, and others. The Bureau requests comment on whether continuing to treat these services differently for purposes of the definition of discount points and origination points or fees depending on what party provides those services would hinder consumers' ability to shop among multiple creditors using the interest rate on loans that do not include discount points and origination points or fees.

Alternatively, the Bureau solicits comment on whether fees for all services provided by an affiliate of a creditor or loan originator organization should be excluded from the definition of discount points and origination points or fees. The Bureau solicits comment on whether excluding affiliate fees consistent with the exclusion for third-party fees would facilitate consumers' ability to shop using the interest rates on loans that do not include discount points and origination points or fees. The Bureau remains concerned, however, that such an exclusion for affiliates fees could be used by creditors to circumvent the prohibition in proposed § 1026.36(d)(2)(ii). For example, creditors could have affiliates perform certain services that are typically performed by the creditor (subject to RESPA restrictions), and exclude fees for those services under this exception. This would permit such a creditor to make available to consumers an interest rate for a loan that does not include discount points or origination points or fees, as defined, but still impose up front through its affiliate some or all of the costs that, in light of the purpose of proposed § 1026.36(d)(2)(ii), more properly should be included in the interest rate.

As a third alternative, the Bureau solicits comment on whether it should exclude certain services that unambiguously relate to ancillary services, such as credit reports, appraisals, and property inspections, rather than core loan origination services, even if the creditor, loan originator organization, or an affiliate of either performs those services, so long as the amount paid for those services is bona fide and reasonable. The core loan origination services that could not be excluded would be ones that specifically relate to the origination of a mortgage loan and typically are provided by the creditor or the loan originator organization, possibly clarified further by reference to the meaning of ''loan originator'' in proposed § 1026.36(a)(3). The Bureau requests comment on whether such an approach is likely to improve the ease with which consumers can compare loans that does not include discount points and origination points or fees from different creditors, by ensuring that the types of fees incorporated into the interest rate for the loans that does not include discount points and origination points or fees generally remain constant across different creditors. The Bureau further solicits comment on how such ancillary

services that would be excluded from the definition, and core origination services that would not be excluded from the definition, might be described clearly enough to distinguish the two. For example, would elaborating on core origination services by reference to the kinds of activities described in the definition of ''loan originator'' in proposed § 1026.36(a)(3) be a workable and sufficient approach?

Understanding trade-offs. As previously discussed, the Bureau is proposing to mandate that creditors make available a comparable, alternative loan that does not include discount points and origination points or fees to help assure that consumers understand that points and fees can vary with the interest rate and that there are trade-offs for the consumer to consider.

Consumer groups have raised concerns that consumers' ability to choose to pay discount points and origination points or fees may not actually be beneficial to consumers because they do not understand trade-offs between upfront discount points and origination points or fees and paying a higher interest rate. Furthermore, even if consumers understand such trade-offs, they may not be able to determine whether discount points and origination points or fees paid up front result in a reasonably proportionate interest rate reduction. There is also concern that creditors may present multiple permutations and, because of their complexity and opaqueness, consumers may not be easily able to make such evaluations.

Consumer testing conducted by the Bureau on closed-end mortgage disclosures suggests that some consumers do understand that there is a trade-off between paying upfront discount points and origination points or fees and paying a higher interest rate. Specifically, as discussed in part II.E above, the Bureau is proposing to combine certain disclosures that consumers receive in connection with applying for and closing on a mortgage loan under TILA and RESPA. As discussed in the supplementary information to that proposed rule, the Bureau conducted extensive consumer testing on these proposed disclosure forms. Through this consumer testing, the Bureau specifically examined how the required disclosures should work together on the integrated disclosure to maximize consumer understanding. As part of the consumer testing, the Bureau looked at how consumers would make trade-offs between the interest rate and closing costs. For example, in one round of testing, participants compared two adjustable rate loans with different closing costs. One loan had a 2.75 percent initial interest rate that adjusted every year after Year 5 with $11,448 in closing costs; the other loan had an 3.5 percent initial interest rate that adjusted every year after Year 5 with $3,254 in closing costs. In subsequent rounds of testing, the Bureau tested forms that presented interest only loans; various adjustable rate loans; balloon payments; bi-weekly payment loans; loans with escrow accounts, partial escrow accounts, and no escrow accounts; different closing costs; and different amounts of cash to close.

Significantly, in this testing, participants were able to make multi-factored trade-offs between the interest rate and monthly payments and the cash needed to close based on their personal situations. Many participants were aware of the trade-off between the cash to close and the interest rate and corresponding monthly loan payment. When they chose the higher interest rate, they understood it would result in a higher monthly payment. They made this choice however, because they knew they did not have access to the needed cash to close. Conversely, other participants were willing to pay the higher closing costs to lower the monthly payment. Even with increasingly complicated decisions, participants continued to be able to use the disclosures to make certain multi-factored trade-offs and gave rational and personal explanations of their choices.

Thus, the Bureau believes that providing information to consumers about the comparable, alternative loan that does not include discount points and origination points or fees so that consumers can compare these loans to loans that include such points or fees and have lower interest rates facilitates consumers' ability to choose the trade-off that best fits their needs. As discussed above, for retail transactions, a creditor will be deemed to be making the loan available if, any time the creditor provides a quote specific to the consumer for a loan that includes discount points and origination points or fees, the creditor also provides a quote for a comparable, alternative loan that does not include those discount points and origination points or fees (unless the consumer is unlikely to qualify for the loan). The interest rate on the loan that does not include discount points and origination points or fees provides a baseline interest rate for the consumer. By having the interest rate on this loan as the baseline, consumers may better understand the trade-off that the creditor is providing to the consumer for paying discount points and origination points or fees in exchange for a lower interest rate.

In addition, to further achieve the goal of enhancing consumer understanding of the trade-offs of making upfront payments in return for a reduced interest rate, the Bureau is also considering and solicits comment on whether there should be a requirement after application that a creditor disclose to a consumer a loan that does not include discount points and origination points or fees. As discussed in part II.E above, the Bureau issued a proposal to combine certain disclosures that consumers receive in connection with applying for and closing on a mortgage loan under TILA and RESPA. Under that proposal, the Bureau proposed to require creditors to provide a ''Loan Estimate'' not later than the third business day after the creditor receives the consumer's application. *See* proposed § 1026.19(e) under the TILA–RESPA Integration Proposal. This Loan Estimate would contain information about the loan to which the Loan Estimate relates. The first page of the Loan Estimate would contain, among other things, information about the interest rate, the regular periodic payments, and the amount of money the consumer would need at closing including the total amount of closing costs. The second page of the Loan Estimate would contain, among other things, a detailed list of the closing costs. *See* proposed § 1026.37(f) under the TILA–RESPA Integration Proposal.

The Bureau solicits comment on whether it would be useful for the consumer if, at the time a creditor first provides a Loan Estimate for a loan that includes discount points and origination points or fees, the creditor also were required to provide either a complete Loan Estimate, or just the first page of the Loan Estimate, for a comparable, alternative loan that does not include discount points and origination points or fees. Thus, if the Loan Estimate the creditor initially provides to the consumer not later than the third business day after the creditor receives the consumer's application describes a loan that includes discount points and origination points or fee, the creditor also would be required to disclose a second Loan Estimate (or at least the first page of the Loan Estimate) at that time to the consumer that describes the comparable, alternative loan that does not include discount points and origination points or fees. The Bureau specifically solicits comment on whether receiving this second Loan Estimate from the same creditor would be helpful to the consumer in understanding the trade-off

in the reduction in the interest rate that the consumer is receiving in exchange for paying discount points and origination points or fees, and helpful to the consumer in deciding which loan to choose.

The Bureau expects that, if this alternative were adopted, it would not become effective until the rules mandating the Loan Estimate are finalized. Until the Loan Estimate is finalized, creditors are required to provide two different disclosure forms to consumers applying for a mortgage, namely the mortgage loan disclosures required under TILA and the GFE required under RESPA. The Bureau believes that it would create information overload for consumers to receive two disclosure forms for the loan that includes discount points and origination points or fees, and two disclosure forms for the comparable, alternative loan that does not include discount points and origination points or fees.

Competitive Trade-Off

Proposed § 1026.36(d)(2)(ii)(C) provides that no discount points and origination points or fees may be imposed on the consumer in connection with a transaction subject to proposed § 1026.36(d)(2)(ii)(A) unless there is a bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). In addition, for any rebate paid by the creditor that will be applied to reduce the consumer's settlement charges, the creditor must provide a bona fide rebate in return for an increase in the interest rate compared to the interest rate for the loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). As discussed in more detail below, the Bureau has evaluated three primary types of approaches to implement a requirement that the trade-off be ''bona fide.''

The Bureau solicits comment on whether the Bureau should adopt a ''bona fide'' requirement to help ensure that all consumers receive a competitive market trade-off between the interest rate and the payment of discount points and origination points or fees or whether, alternatively, market forces are sufficient to ensure that consumers generally receive such competitive trade-offs. As discussed above, the requirement to make available a loan that does not include discount points and origination points or fees informs consumers of the baseline interest rates on the loans that do not include discount points and origination points or fees so that consumers can make informed decisions on the trade-offs presented by creditors. In addition, as discussed above, consumer testing conducted by the Bureau on closed-end mortgage disclosures suggests that some consumers do understand aspects of the trade-off between paying upfront discount points and origination points or fees and paying a higher interest rate. The Bureau believes that, in general, creditors will need to incorporate competitive pricing into their pricing policies to attract consumers that do understand this trade-off and shop for the best pricing. Nonetheless, the Bureau recognizes that there will be some consumers who are less sophisticated in terms of understanding the trade-off, and creditors may be able to present those consumers less competitive pricing than what is in the creditor's pricing policy. Thus, the Bureau solicits comment on whether a ''bona fide'' requirement is necessary to ensure that all consumers receive a competitive market trade-off between the interest rate and the payment of discount points and origination points or fees.

In addition, the Bureau seeks comment on how it might structure such a ''bona fide'' requirement, if one is appropriate. In considering this issue, the Bureau has evaluated the following three primary types of approaches to structuring the bona fide trade-off requirements: (1) A pricing-policy approach; (2) a minimum rate reduction approach; and (3) a market-based benchmark approach.

Pricing-policy approach. A pricing-policy approach would require that, in transactions where the requirement to make available a loan that does not include discount points and origination points or fees would apply, a creditor also must meet the following four requirements:

- First, the creditor would be required to establish a pricing policy that sets forth the amount of discount points and origination points or fees that each consumer would pay or the amount of the ''rebate'' that each consumer would receive, as applicable, for each interest rate on each loan product available to the consumer. The term ''rebate'' refers to an amount contributed by the creditor to pay some or all of the consumer's transaction costs, generally resulting from the consumer's agreeing to accept a ''premium'' (above par) interest rate.
- Second, the creditor would be allowed to change its pricing policy periodically, but may not do so to provide less favorable pricing for the purpose of a consumer's particular transaction. The term ''pricing'' would mean the interest rate applicable to a loan and the corresponding discount points and origination points or fees a consumer would pay or the amount of the rebate that the consumer would receive, as applicable, for the interest rate applicable to the loan.
- Third, at the time the interest rate on the transaction is set (or ''locked''), the pricing offered to the consumer must be no less favorable than the pricing established by the creditor's current pricing policy.
- Fourth, at the time the interest rate on the transaction is set, the interest rate offered to the consumer in return for paying discount points and origination points or fees must be lower than the interest rate for the loan that does not include discount points and origination points or fees.

Under such an approach, a creditor would not be required to charge all consumers the same amount of discount points and origination points or fees or provide all consumers the same amount of rebate, as applicable, at each interest rate for each loan product. A creditor's pricing policy could still set forth specific pricing adjustments for determining the amount of discount points and origination points or fees or the amount of the rebate, as applicable, for consumers at each rate for each loan, based on factors such as the consumer's risk profile (such as the consumer's credit score) and the characteristics of the loan or the property securing the loan (such as the loan-to-value ratio, or whether the property will be owner-occupied). The pricing adjustments, however, would need to be set forth with specificity in the pricing policy. These pricing adjustments could be changed periodically, for example, for market or other reasons, but may not be changed to provide less favorable pricing for the purpose of a consumer's particular transaction.

Also, under such an approach, creditors would still be allowed to provide more favorable pricing to a particular consumer than the pricing set forth in the creditor's current pricing policy. This would preserve consumers' ability to negotiate better pricing with creditors. For example, upon receiving a rate quote from a creditor, a consumer could inform the creditor that a competitor is offering a lower rate for the consumer paying the same amount of discount points and origination points or fees. The creditor could agree to match the lower rate under this approach.

The Bureau recognizes that, with this flexibility, a creditor could potentially circumvent the purpose of this approach by setting forth less competitive pricing in its pricing policy but then regularly departing from the policy to provide more favorable pricing to particular consumers, especially more sophisticated consumers. On the other hand, the Bureau believes that several factors could militate against a creditor doing this. Processing frequent exceptions to the pricing policy may be inefficient for a creditor; expose creditors to risks, such as potential violations of fair lending laws; and would call into question whether the creditor has complied with the requirement under this approach to set forth its pricing policy. In addition, competition may discipline creditors to offer competitive rates. The Bureau specifically requests comment on whether such an approach should be adopted, as well as on its advantages and disadvantages. The Bureau also requests comment specifically on the burdens this approach would create for creditors to retain records necessary to document the pricing policy applicable to each consumer's transaction.

Minimum rate reduction. The Bureau also requests comment on an alternative approach under which the consumer must receive a minimum reduction in the interest rate for each point paid (compared to the interest rate that is applicable to the loan that does not include discount points and origination points or fees where fees would be converted to points). The Bureau is aware that Fannie Mae will purchase or securitize loans only if the total points and fees (converted into points) do not exceed five points. Fannie Mae excludes ''bona fide'' discount points for this calculation and specifies that, to be bona fide, each discount point must result in at least a .25 percent reduction in the interest rate. Similarly, the rule could specify that for each point paid by the consumer in discount points and origination points or fees (where fees would be converted to points), the consumer must receive a reduction in the interest rate of at least a certain portion of a percentage point, *e.g.,* .125 of a percentage point, compared to the interest rate that is applicable to the loan that does not include discount points and origination points or fees.

However, the Bureau is concerned that mandating such a minimum reduction in the interest rate for each point paid could unduly constrict pricing of mortgage products. The Bureau understands that creditors often use the dollar amount of the premium that the creditor expects to receive from the secondary market for a loan at a particular rate as a factor in its determination of the reduction in the interest rate given for each point paid. The Bureau understands that these premiums do not move in a linear manner. Thus, depending on the premiums that are paid by the secondary market for each interest rate, the amount of reduction in the interest rate may be .125 of a percentage point for the first point paid, but may be .25 of a percentage point for the second point paid. In addition, the amount of reduction in the interest rate for each point paid by the consumer in discount points and origination points or fees also could vary for a number of other reasons, such as by product type (*e.g.,* 30-year fixed-rate loans versus adjustable rate loans).

Market-based benchmarks. The Bureau has also considered whether an objective measure for determining whether a creditor is providing a competitive market trade-off in the interest rate on a loan that includes discount points and origination points or fees, as compared to established industry standards, could be achieved by reference to current, or at least recent, trade-offs actually provided to consumers.

In the Board's 2011 Ability to Repay (ATR) Proposal, the Board proposed a definition of ''bona fide discount points'' for use in determining whether a loan is a ''qualified mortgage.'' Under the 2011 ATR Proposal, a creditor can make a ''qualified mortgage,'' which provides the creditor with protections against potential liability under the general ability-to-repay standard set forth in that proposal.[65] Also, under the 2011 ATR Proposal, a qualified mortgage generally may not have ''points and fees,'' as that term is defined in the Board's proposal, that exceed three percent of the total loan amount.[66]

The 2011 ATR Proposal provided exceptions to the calculation of points and fees for certain bona fide discount points, which were defined as ''any percent of the loan amount'' paid by the consumer that reduces the interest rate or time-price differential applicable to the mortgage loan by an amount based on a calculation that: (1) Is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer; and (2) accounts for the amount of compensation that the creditor can reasonably expect to receive from secondary market investors in return for the mortgage loan.[67]

As discussed by the Board in its 2011 ATR Proposal, the value of a rate reduction in a particular mortgage transaction on the secondary market is based on many complex factors, which interact in a variety of complex ways.[68] These factors may include, among others:

- The product type, such as whether the loan is a fixed-rate or adjustable-rate mortgage, or has a 30-year term or a 15-year term.
- How much the mortgage-backed securities (MBS) market is willing to pay for a loan at that interest rate and the liquidity of an MBS with loans at that rate.
- How much the secondary market is willing to pay for excess interest on the loan that is available for capitalization outside of the MBS market.
- The amount of the guaranty fee required to be paid by the creditor to the investor.[69]

The Bureau recognizes, however, that it may not be appropriate to mandate the same market-based approach (or any other approach to bona fide reductions in the interest rate) in both the ATR context and this context given the differences between the purposes and scope of the requirements. For ATR purposes, a discount point must be ''bona fide'' to be excluded from the three-percent points and fees limit on qualified mortgages.[70] For this rulemaking, the Bureau is considering adopting a mandatory trade-off for any transaction that is subject to the requirement that a creditor make available a loan without discount points and origination points or fees. In addition, the bona fide trade-off in this context includes discount points and origination points or fees, which is broader than the inclusion in the 2011 ATR Proposal of just discount points. The same approach may not be

[65] 76 FR 27390 (May 11, 2011); *see also* section 1412 of the Dodd-Frank Act (adding new TILA section 129C(b), which sets forth the statutory standards for a ''qualified mortgage'').

[66] 76 FR 27390, 27396 (May 11, 2011); *see also* section 1412 of the Dodd-Frank Act (adding new TILA section 129C(b)(2)(A)(vii), which sets the three percent cap for a ''qualified mortgage'').

[67] The ATR proposal was implementing new TILA section 129C(b)(2)(C)(iv), as added by Dodd-Frank Act section 1412, which mandates that, to be bona fide discount points, ''the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.''

[68] 76 FR 27390, 27467 (May 11, 2011).

[69] *Id.*

[70] The 2011 ATR Proposal would not prohibit a creditor from charging discount points that are not bona fide, but such points would count towards the points-and-fees limit.

appropriate for both contexts for a number of reasons, including the fact that the inclusion of origination points or fees may introduce different complexities.

Another variation of the market-based approach would be to measure whether a trade-off is bona fide through reference to regularly obtained, robust, and reliable data on the trade-offs currently being afforded, possibly by conducting a survey of actual market terms. According to this variation, the trade-off available from a particular creditor would be measured against this benchmark to determine whether it is deemed competitive for purposes of this rule. At present, the Bureau knows of no existing survey or other source of such data and, therefore, assumes that pursuing such an approach would require that the Bureau establish such a survey or other source of data for these purposes.

The Bureau is concerned that it may be difficult to effectively implement this variation of the market-based approach in a manner that adequately accounts for the impacts of all the factors that affect the value that the secondary market places on a rate reduction for a particular transaction. In addition, the Bureau recognizes that a determination whether a creditor is providing a competitive market trade-off in the interest rate on a loan that is based on actual market trade-offs in the recent past might not be reflective of future trade-offs, given that the MBS market varies frequently.

The Bureau requests comment on the feasibility of using this variation of a market-based benchmark to determine whether a creditor is providing a competitive market trade-off in the interest rate on a loan that includes discount points and origination points or fees compared to industry standards. More generally, the Bureau solicits comment on whether any market-based benchmark should be pursued in this rulemaking and, if so, how it should be structured.

36(d)(2)(ii)(A)

The Bureau's Proposal

As discussed in more detail above, the Bureau proposes in new § 1026.36(d)(2)(ii)(A) restrictions on discount points and origination points or fees in a closed-end consumer credit transaction secured by a dwelling, if any loan originator will receive from any person other than the consumer compensation in connection with the transaction. Specifically, in these transactions, a creditor or loan originator organization may not impose on the consumer any discount points and origination points or fees in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees; the creditor need not make available the alternative, comparable loan, however, if the consumer is unlikely to qualify for such a loan.

Scope. To provide guidance on the scope of the transactions to which proposed § 1026.36(d)(2)(ii) applies, the Bureau is proposing comment 36(d)(2)(ii)–1 to provide examples of transactions to which § 1026.36(d)(2)(ii) applies, and examples of transactions to which § 1026.36(d)(2)(ii) does not apply. Specifically, proposed comment 36(d)(2)(ii)–1.i provides the following three examples of transactions in which the prohibition in proposed § 1026.36(d)(2)(ii) applies: (1) For transactions that do not involve a loan originator organization, the creditor pays compensation in connection with the transaction (*e.g.,* a commission) to individual loan originators that work for the creditor; (2) the creditor pays a loan originator organization compensation in connection with a transaction, regardless of how the loan originator organization pays compensation to individual loan originators that work for the organization; and (3) the loan originator organization receives compensation directly from the consumer in a transaction and the loan originator organization pays individual loan originators that work for the organization compensation in connection with the transaction. Proposed comment 36(d)(2)(ii)–1.ii provides the following two examples of transactions where the prohibition in proposed § 1026.36(d)(2)(ii) does not apply: (1) For transactions that do not involve a loan originator organization, the creditor pays individual loan originators that work for the creditor only in the form of a salary, hourly wage, or other compensation that is not tied to the particular transaction; and (2) the loan originator organization receives compensation directly from the consumer in a transaction and the loan originator organization pays individual loan originators that work for the organization only in the form of a salary, hourly wage, or other compensation that is not tied to the particular transaction.

Proposed comment 36(d)(2)(ii)–1.iii clarifies the relationship of proposed § 1026.36(d)(2)(ii) to the provisions prohibiting dual compensation in proposed § 1026.36(d)(2)(i). This proposed comment clarifies that § 1026.36(d)(2)(ii) does not override any of the prohibitions on dual compensation set forth in § 1026.36(d)(2)(i). For example, § 1026.36(d)(2)(ii) does not permit a loan originator organization to receive compensation in connection with a transaction both from a consumer and from a person other than the consumer.

Loan product where consumer will not pay discount points and origination points or fees. Proposed comment 36(d)(2)(ii)(A)–3 would provide guidance on identifying the comparable, alternative loan product that does not include discount points and origination points or fees. As explained in proposed comment 36(d)(2)(ii)(A)–3, in some cases, the creditor's pricing policy may not contain an interest rate for which the consumer will neither pay discount points and origination points or fees nor receive a rebate. For example, assume that a creditor's pricing policy only provides interest rates in ⅛ percent increments. Assume also that under the creditor's current pricing policy, the pricing available to a consumer for a particular loan product would be for the consumer to pay a 5.0 percent interest rate with .25 discount point, pay a 5.125 percent interest rate and receive .25 point in rebate, or pay a 5.250 percent interest rate and receive a 1.0 point in rebate. This creditor's pricing policy does not contain a rate for this particular loan product where the consumer would neither pay discount points and origination points or fees nor receive a rebate from the creditor. In such cases, proposed comment 36(d)(2)(ii)(A)–3 clarifies that the interest rate for a loan that does not include discount points and origination points or fees would be the interest rate for which the consumer does not pay discount points and origination points or fees and the consumer would receive the smallest possible amount of rebate from the creditor. Thus, in the example above, the interest rate for that particular loan product that does not include discount points and origination points or fees is the 5.125 percent rate with .25 point in rebate.

Make available. Proposed comment 36(d)(2)(ii)(A)–1 would provide guidance on how creditors may meet the requirement in § 1026.36(d)(2)(ii)(A) to make available the required comparable, alternative loan that does not include discount points and origination points or fees. Specifically, proposed comment 36(d)(2)(ii)(A)–1.i provides guidance for transactions that do not involve a loan originator organization. In this case, a creditor will be deemed to have made available to the consumer a comparable, alternative loan that does not include discount points and origination points

or fees if, any time the creditor provides any oral or written estimate of the interest rate, the regular periodic payments, the total amount of the discount points and origination points or fees, or the total amount of the closing costs specific to a consumer for a transaction that would include discount points and origination points or fees, the creditor also provides an estimate of those same types of information for a comparable, alternative loan that does not include discount points and origination points or fees, unless a creditor determines that a consumer is unlikely to qualify for such a loan. A creditor using this safe harbor is required to provide the estimate for the loan that does not include discount points and origination points or fees only if the estimate for the loan that includes discount points and origination points or fees is received by the consumer prior to the estimated disclosures required within three business days after application pursuant to the Bureau's regulations implementing the Real Estate Settlement Procedures Act (RESPA). *See* proposed comment 36(d)(1)(A)–1.i.A.

Proposed comment 36(d)(2)(ii)(A)–1.i.B clarifies that a creditor using this safe harbor is required to provide information about the loan that does not include discount points and origination points or fees only when the information about the loan that includes discount points or origination points or fees is specific to the consumer. Advertisements would be excluded from this requirement. *See* comment 2(a)(2)–1.ii.A. If the information about the loan that includes discount points or origination points or fees is an advertisement under § 1026.24, the creditor is not required to provide the quote for the loan that does not include discount points and origination points or fees. For example, if prior to the consumer submitting an application, the creditor provides a consumer an estimated interest rate and monthly payment for a loan that includes discount points and origination points or fees, and the estimates were based on the estimated loan amount and the consumer's estimated credit score, then the creditor must also disclose the estimated interest rate and estimated monthly payment for the loan that does not include discount points and origination points or fees. In contrast, if the creditor provides the consumer with a preprinted list of available rates for different loan products that include discount points and origination points or fees, the creditor is not required to provide the information about the loans that do not include discount points and origination points or fees under this safe harbor. Nonetheless, as discussed in more detail below, the Bureau solicits comment on whether the advertising rules in § 1026.24(d) should be revised as well.

Under this safe harbor, proposed comment 36(d)(2)(ii)(A)–1.i.C clarifies that ''comparable, alternative loan'' means that the two loans for which estimates are provided as discussed above have the same terms and conditions, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such the amount of regular periodic payments), and the amount of any discount points and origination points or fees. The Bureau believes that, for a consumer to compare loans meaningfully and usefully, it is important that the only terms and conditions that are different between the loan that includes discount points and origination points or fees and the loan that does not include discount points and origination points or fees are: (1) The interest rates applicable to the loans; (2) any terms that change solely as a result of the change in the interest rate (such the amount of regular periodic payments); and (3) the fact that one loan includes discount points and origination points or fees and the other loan does not. Proposed comment 36(d)(2)(ii)(A)–4 provides guidance on the meaning of ''regular periodic payment'' and indicates that this term means payments of principal and interest (or interest only, depending on the loan features) specified under the terms of the loan contract that are due from the consumer for two or more unit periods in succession. The Bureau believes that limiting the differences between the two loans will allow consumers to focus consumer choice on core loan terms and help consumers understand better the trade-off between the two loans in terms of paying discount points and origination points or fees in exchange for a lower interest rate. In addition, proposed comment 36(d)(2)(ii)(A)–1.i.C clarifies that a creditor using this safe harbor must provide the estimate for the loan that does not include discount points and origination points or fees in the same manner (*i.e.,* orally or in writing) as provided for the loan that does include discount points and origination points or fees. For both written and oral estimates, both of the written (or both of the oral) estimates must be given at the same time.

Also, as clarified by proposed comment 36(d)(2)(ii)(A)–1.i.E, a creditor using this safe harbor must disclose estimates of the interest rate, the regular periodic payments, the total amount of the discount points and origination points or fees, and the total amount of the closing costs for the loan that does not include discount points and origination points or fees only if the creditor disclosed estimates for those types of information for the loan that includes discount points and origination points or fees. For example, if a creditor provides estimates of the interest rate and monthly payments for a loan that includes discount points and origination points or fees, the creditor using the safe harbor must provide estimates of the interest rate and monthly payments for the loan that does not includes discount points and origination points or fees, such as saying ''your estimated interest rate and monthly payments on this loan product where you will not pay discount points and origination points or fees to the creditor or its affiliates is [x] percent, and $[xx] per month.'' On the other hand, if the creditor provides an estimate of only the interest rate for the loan that includes discount points and origination points or fees and does not provide an estimate of the regular periodic payments for that loan, the creditor using the safe harbor is required only to provide an estimate of the interest rate for the loan that does not include discount points and origination points or fees and is not required to provide an estimate of the regular periodic payments for the loan without discount points and origination points or fees.

Proposed comment 36(d)(2)(ii)(A)–1.ii would specify guidance for transactions that involve a loan originator organization. In this case, a creditor will be deemed to have made available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees if the creditor communicates to the loan originator organization the pricing for all loans that do not include discount points and origination points or fees. Separately, mortgage brokers are prohibited under § 1026.36(e) from steering consumers into a loan just to maximize the broker's commission. The rule sets forth a safe harbor for complying with provisions prohibiting steering if the broker presents to the consumer three loan options that are specified in the rule. One of these loan options is the loan with the lowest total dollar amount for discount points and origination points or fees. Thus, mortgage brokers that are using the safe harbor must present to the consumer the loan with the lowest interest rate that

does not include discount points and origination points or fees. The Bureau believes that most mortgage brokers are using the safe harbor to comply with the provision prohibiting steering, so most consumers in transactions that involve mortgage brokers would be informed of the loan with the lowest interest rate that do not include discount points and origination points or fees.

The Bureau solicits comments generally on the safe harbor approaches set forth in proposed comment 36(d)(2)(ii)(A)–1, and specifically on the effectiveness of these approaches to ensure that consumers are informed of the options to obtain loans that do not include discount points and origination points or fees. As discussed in more detail above, the Bureau specifically requests comment on whether there should be a requirement after application that a creditor disclose to a consumer a loan that does not include discount points and origination points or fees. The Bureau specifically solicits comment on whether it would be useful for the consumer if, at the time a creditor first provides a Loan Estimate for a loan that includes discount points and origination points or fees, the creditor also were required to provide either a complete Loan Estimate, or just the first page of the Loan Estimate, for a comparable, alternative loan that does not include discount points and origination points or fees.

In addition, as discussed in more detail above, through the proposal, the Bureau intends to facilitate consumer shopping by enhancing the ability of consumers to make comparisons using loans that do not include discount points and origination points or fees available from different creditors as a basis for comparison. Nonetheless, the Bureau is concerned that by the time a consumer receives a quote from a particular creditor for a loan that does not include discount points and origination points or fees, the consumer may have already completed his or her shopping in comparing loans from different creditors. Thus, as discussed in more detail above, the Bureau specifically solicits comment on whether the advertising rules in § 1026.24 should be revised to enable consumers to make comparisons using loans that do not include discount points and origination points or fees available from different creditors as a basis for comparison.

Transactions for which a consumer is unlikely to qualify. Proposed comment 36(d)(2)(ii)(A)–2 provides guidance on how a creditor may determine whether a consumer is likely not to qualify for a comparable, alternative loan that does not include discount points and origination points or fees. Specifically, this proposed comment provides that the creditor must have a good-faith belief that a consumer will not qualify for a loan that has the same terms and conditions as the loan that includes discount points and origination points or fees, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such the amount of regular periodic payments) and the fact that the consumer will not pay discount points and origination points or fees. Under this proposed comment, the creditor's belief that the consumer is likely not to qualify for such a loan must be based on the creditor's current pricing and underwriting policy. In making this determination, the creditor may rely on information provided by the consumer, even if it subsequently is determined to be inaccurate.

36(d)(2)(ii)(B)

Definition of Discount Points and Origination Points or Fees

Under proposed § 1026.36(d)(2)(ii)(B), the term ''discount points and origination points or fees'' for purposes of § 1026.36(d) and (e) means all items that would be included in the finance charge under § 1026.4(a) and (b) and any fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2) that are payable at or before consummation by the consumer to a creditor or a loan originator organization, except for (1) interest, including any per-diem interest, or the time-price differential; (2) any bona fide and reasonable third-party charges not retained by the creditor or loan originator organization; and (3) seller's points and premiums for property insurance that are excluded from the finance charge under § 1026.4(c)(5), (c)(7)(v) and (d)(2). Proposed comment 36(d)(2)(ii)(B)–4 provides that, for purposes of § 1026.36(d)(2)(ii)(B), the phrase ''payable at or before consummation by the consumer to a creditor or a loan originator organization'' includes amounts paid by the consumer in cash at or before closing or financed as part of the transaction and paid out of the loan proceeds. The Bureau notes that § 1026.36(d)(3) provides that for purposes of § 1026.36(d), affiliates must be treated as a single person. Thus, for purposes of the definition of discount points and origination points or fees, charges that are payable by a consumer to a creditor's affiliate or the affiliate of a loan originator organization are deemed to be payable to the creditor or loan originator organization, respectively. *See* proposed comment 36(d)(2)(ii)–3.

The Bureau believes the definition of discount points and origination points or fees is consistent with the description of the discount points, origination points, or fees referenced in the statutory ban in TILA section 129B(c)(2)(B)(ii), which was added by section 1403 of the Dodd-Frank Act. 12 U.S.C. 1639b(c)(2)(B)(ii). Specifically, TILA section 129B(c)(2)(B)(ii) uses the phrase ''upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator).'' The Bureau interprets the phrase ''upfront payment of discount points, origination points, or fees, however denominated'' generally to mean finance charges (except for interest) that are imposed in connection with the mortgage transaction that are payable at or before consummation by the consumer. The Bureau believes that Congress did not intend to cover charges that are payable by the consumer in comparable cash real estate transactions, such as real estate broker fees, where these charges are imposed regardless of whether the consumer engages in a credit transaction. The provision prohibiting consumers from paying upfront discount points and origination points or fees amends TILA, which generally regulates credit transactions, and not the underlying real estate transactions that are in connection with the extensions of credit.

The proposed definition of discount points and origination points or fees also includes an exception for any bona fide and reasonable third-party charges not retained by the creditor, loan originator organization, or any affiliate of either, consistent with TILA section 129B(c)(2)(B)(ii). The Bureau believes that this exception for bona fide and reasonable third-party charges means that Congress presumptively intended to include such third-party charges in the definition of ''discount points, origination points, or fees'' where they are retained by the creditor, mortgage originator, or affiliates of either. In addition, the exception for fees that are not ''retained'' by the creditor is consistent with the current comment 36(d)(1)–7 (re-designated as proposed comment 36(d)(2)(i)–2.i) and the Bureau's position that the definition of ''discount points, origination points, or fees'' includes upfront payments when the consumer either pays in cash or finances these payments from loan

proceeds because in either instance, the creditor, mortgage originator, or affiliates retain such payments. The proposed definition of discount points and origination points or fees reflects proposed changes that the Bureau set forth in the TILA–RESPA Integration Proposal to the definition of finance charge for purposes of mortgage transactions. Specifically, in the TILA–RESPA Integration Proposal, the Bureau proposes to add new § 1026.4(g) to specify that § 1026.4(a)(2) and (c) through (e), other than § 1026.4(c)(2), (c)(5), (c)(7)(v), and (d)(2), do not apply to closed-end transactions secured by real property or a dwelling. Thus, under the TILA–RESPA Integration Proposal, the term finance charge for purposes of closed-end transactions secured by real property or a dwelling would mean all items that would be included in the finance charge under § 1026.4(a) and (b) and fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2) except for charges for late payments or for delinquency, default or other similar occurrences, seller's points, and premiums for property insurance that are excluded from the finance charge under § 1026.4(c)(2), (c)(5), (c)(7)(v) and (d)(2). In the supplementary information to the TILA–RESPA Integration Proposal, the Bureau solicits comment on the definition of finance charge generally in § 1026.4 as it relates to closed-end mortgage transactions, and specifically proposed § 1026.4(g). To the extent that the Bureau revises the definition of finance charge as it relates to closed-end mortgage transaction in response to the TILA–RESPA Integration Proposal, the Bureau expects to make corresponding changes to the definition of discount points and origination points or fees.

Proposed comment 36(d)(2)(ii)(B)–1 provides guidance generally on the definition of discount points and origination points or fees as set forth in proposed § 1026.36(d)(2)(ii)(B). This proposed comment clarifies that, for purposes of proposed § 1026.36(d)(2)(ii)(B), ''items included in the finance charge under § 1026.4(a) and (b)'' means those items included under § 1026.4(a) and (b), without reference to any other provisions of § 1026.4. Nonetheless, proposed § 1026.36(d)(2)(ii)(B)(*3*) specifies that items that are excluded from the finance charge under § 1026.4(c)(5), (c)(7)(v) and (d)(2) are also excluded from the definition of discount points and origination points or fees. For example, property insurance premiums may be excluded from the finance charge if the conditions set forth in § 1026.4(d)(2) are met, and these premiums also may be excluded if they are escrowed. *See* § 1026.4(c)(7)(v), (d)(2). Under proposed § 1026.36(d)(2)(ii)(B)(*3*), these premiums are also excluded from the definition of discount points and origination points or fees. In addition, charges in connection with transactions that are payable in a comparable cash transaction are not included in the finance charge. *See* comment 4(a)–1. For example, property taxes imposed to record the deed evidencing transfer from the seller to the buyer of title to the property are not included in the finance charge because they would be paid even if no credit were extended to finance the purchase. Thus, these charges would not be included in the definition of discount points and origination points or fees.

The proposed definition of discount points and origination points or fees also excludes any bona fide and reasonable third-party charges not retained by the creditor or loan originator organization. Proposed comment 36(d)(2)(B)–2 provides guidance on this exception. Specifically, proposed comment 36(d)(2)(B)–2 notes that § 1026.36(d)(2)(ii)(B) generally includes any fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2). Section 1026.4(a)(2) discusses fees charged by a ''third party'' that conducts the loan closing. For purposes of § 1026.4(a)(2), the term ''third party'' includes affiliates of the creditor or the loan originator organization. Nonetheless, for purposes of the definition of discount points and origination points or fees, the term ''third party'' does not include affiliates of the creditor or the loan originator. Thus, fees described in § 1026.4(a)(2) would be included in the definition of discount points and origination points or fees if they are charged by affiliates of the creditor or the loan originator. Nonetheless, fees described in § 1026.4(a)(2) would not be included in such definition if they are charged by a third party that is not an affiliate of the creditor or any loan originator organization, pursuant to the exception in § 1026.36(d)(2)(ii)(B)(*2*).

The proposed comment also recognizes that, in some cases, amounts received for payment for third-party charges may exceed the actual charge because, for example, the creditor cannot determine with accuracy what the actual charge will be before consummation. In such a case, the difference retained by the creditor or loan originator organization is not deemed to fall within the definition of discount points and origination points or fees if the third-party charge imposed on the consumer was bona fide and reasonable, and also complies with State and other applicable law. On the other hand, if the creditor or loan originator organization marks up a third-party charge (a practice known as ''upcharging''), and the creditor or loan originator organization retains the difference between the actual charge and the marked-up charge, the amount retained falls within the definition of discount points and origination points or fees.

Proposed comment 36(d)(2)(ii)(B)–2 provides two illustrations for this guidance. The first illustration assumes that the creditor charges the consumer a $400 application fee that includes $50 for a credit report and $350 for an appraisal that will be conducted by a third party that is not the affiliate of the creditor or the loan originator organization. Assume that $50 is the amount the creditor pays for the credit report to a third party that is not affiliated with the creditor or with the loan originator organization. At the time the creditor imposes the application fee on the consumer, the creditor is uncertain of the cost of the appraisal because the appraiser charges between $300 and $350 for appraisals. Later, the cost for the appraisal is determined to be $300 for this consumer's transaction. Assume, however, that the creditor uses average charge pricing in accordance with Regulation X. In this case, the $50 difference between the $400 application fee imposed on the consumer and the actual $350 cost for the credit report and appraisal is not deemed to fall within the definition of discount points and origination points or fees, even though the $50 is retained by the creditor. The second illustration specifies that, using the same example as described above, the $50 difference would fall within the definition of discount points and origination points or fees if the appraisers from whom the creditor chooses charge fees between $250 and $300.

Proposed comment 36(d)(2)(ii)(B)–3 provides that, if at the time a creditor must comply with the requirements in proposed § 1026.36(d)(2)(ii) the creditor does not know whether a particular charge will be paid to its affiliate or an affiliate of the loan originator organization or will be paid to a third-party that is not the creditor's affiliate or an affiliate of the loan originator organization, the creditor must assume that the charge will be paid to its affiliates or an affiliate of the loan originator organization, as applicable,

for purposes of complying with the requirements in § 1026.36(d)(2)(ii). For example, assume that a creditor typically uses three title insurance companies, one of which is an affiliate of the creditor and two are not affiliated with the creditor or the loan originator organization. If the creditor does not know at the time it must establish available credit terms for a particular consumer pursuant to proposed § 1026.36(d)(2)(ii) whether the title insurance services will be performed by the affiliate of the creditor, the creditor must assume that the title insurance services will be conducted by the affiliate for purposes of complying with the requirements in § 1026.36(d)(2)(ii).

The Bureau solicits comment generally on the proposed definition of discount points and origination points or fees. As discussed in more detail above, the Bureau requests comment on the scope of the definition of discount points and origination points or fees and its impact on the ease with which consumers can compare loans that do not include discount points and origination points or fees from different creditors.

36(d)(2)(ii)(C)

Proposed § 1026.36(d)(2)(ii)(C) provides that no discount points and origination points or fees may be imposed on the consumer in connection with a transaction subject to proposed § 1026.36(d)(2)(ii)(A) unless there is a bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). In addition, for any rebate paid by the creditor that will be applied to reduce the consumer's settlement charges, the creditor must provide a bona fide rebate in return for an increase in the interest rate compared to the interest rate for the loan that does not include discount points and origination points or fees required to be made available to the consumer under § 1026.36(d)(2)(ii)(A). As discussed in detail above, the Bureau is seeking comment on whether such a bona fide requirement is necessary and, if so, what form the requirement should take.

36(e) Prohibition on Steering

36(e)(3) Loan Options Presented

Section 1026.36(e)(1) provides that a loan originator may not direct or ''steer'' a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest. Section 1026.36(e)(2) provides a safe harbor that loan originators may use to comply with the prohibition set forth in § 1026.36(e)(1). Specifically, § 1026.36(e)(2) provides that a transaction does not violate § 1026.36(e)(1) if the consumer is presented with loan options that meet certain conditions set forth in § 1026.36(e)(3) for each type of transaction in which the consumer expressed an interest. The term ''type of transaction'' refers to whether: (1) A loan has an annual percentage rate that cannot increase after consummation; (2) a loan has an annual percentage rate that may increase after consummation; or (3) a loan is a reverse mortgage.

As set forth in § 1026.36(e)(3), in order for a loan originator to qualify for the safe harbor in § 1026.36(e)(2), the loan originator must obtain loan options from a significant number of the creditors with which the originator regularly does business and must present the consumer with the following loan options for each type of transaction in which the consumer expressed an interest: (1) The loan with the lowest interest rate; (2) the loan with the lowest total dollar amount for origination points or fees and discount points; and (3) a loan with the lowest interest rate without negative amortization, a prepayment penalty, a balloon payment in the first seven years of the loan term, shared equity, or shared appreciation, or, in the case of a reverse mortgage, a loan without a prepayment penalty, shared equity, or shared appreciation. In accordance with current § 1026.36(e)(3)(ii), the loan originator must have a good faith belief that the options presented to the consumer as discussed above are loans for which the consumer likely qualifies.

The Bureau's Proposal

Discount points and origination points or fees. As discussed above, to qualify for the safe harbor in § 1026.36(e)(2), a loan originator must present to a consumer particular loan options, one of which is the loan with the lowest total dollar amount for ''origination points or fees and discount points'' for which the consumer likely qualifies. *See* § 1026.36(e)(3)(C). For consistency, the Bureau proposes to revise § 1026.36(e)(3)(C) to use the terminology ''discount points and origination points or fees,'' which is a defined term in proposed § 1026.36(d)(2)(ii)(B).

In addition, the Bureau proposes to amend 1026.36(e)(3)(C) to address the situation where two or more loans have the same total dollar amount of discount points and origination points or fees. This situation is likely to occur in transactions that are subject to proposed § 1026.36(d)(2)(ii). As discussed above, proposed § 1026.36(d)(2)(ii)(A) requires, as a prerequisite to a creditor, loan originator organization, or affiliate of either imposing any discount points and origination points or fees on a consumer in a transaction, that the creditor also make available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. For transactions that involve a loan originator organization, a creditor will be deemed to have made available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees if the creditor communicates to the loan originator organization the pricing for all loans that do not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. *See* proposed comment 36(d)(2)(ii)(A)–1. Thus, each creditor with whom a loan originator regularly does business generally will be communicating pricing to the loan originator for all loans that do not include discount points and origination points or fees.

Proposed § 1026.36(e)(3)(C) provides that with respect to the loan with the lowest total dollar amount of discount points and origination points or fees, if two or more loans have the same total dollar amount of discount points and origination points or fees, the creditor must disclose the loan with the lowest interest rate that has the lowest total dollar amount of discount points and origination points or fees for which the consumer likely qualifies. For example, for transactions that are subject to proposed § 1026.36(d)(2)(ii), the loan originator must disclose the loan with the lowest rate that does not include discount points and origination points or fees for which the consumer likely qualifies. This proposed guidance will help ensure that loan originators are not steering consumers into loans to maximize the originator's compensation.

The loan with the lowest interest rate. As discussed above, to qualify for the safe harbor in § 1026.36(e)(2), a loan originator must present to a consumer particular loan options, one of which is the loan with the lowest interest rate for which the consumer likely qualifies. *See* § 1026.36(e)(3)(A). Mortgage creditors

and other industry representatives have asked for additional guidance on how to identify the loan with the lowest interest rate for which a consumer likely qualifies as set forth in § 1026.36(e)(3)(A), given that a consumer generally can obtain a lower rate by paying discount points. To provide additional guidance, the Bureau proposes to amend comment 36(e)(3)–3 to clarify that the loan with the lowest interest rate for which the consumer likely qualifies is the loan with the lowest rate the consumer can likely obtain, regardless of how many discount points the consumer must pay to obtain it.

36(f) Loan Originator Qualification Requirements

Section 1402(a)(2) of the Dodd-Frank Act added TILA section 129B, which imposes new requirements for mortgage originators, including requirements for them to be licensed, registered, and qualified, and to include their identification numbers on loan documents. 15 U.S.C. 1639b.

TILA section 129B(b)(1)(A) authorizes the Bureau to issue regulations requiring mortgage originators to be registered and licensed in compliance with State and Federal law, including the SAFE Act, 12 U.S.C. 5101. TILA section 129B(b)(1)(A) also authorizes the Bureau's regulations to require mortgage originators to be ''qualified.'' As discussed in the section-section analysis of § 1026.36(a)(1), above, for purposes of TILA section 129B(b) the term ''mortgage originator'' includes natural persons and organizations. Moreover, for purposes of TILA section 129B(b), the term includes creditors, notwithstanding that the definition in TILA section 103(cc)(2) excludes creditors for certain other purposes.

The SAFE Act imposes licensing and registration requirements on individuals. Under the SAFE Act, loan originators who are employees of a depository institution or a Federally regulated subsidiary of a depository institution are subject to registration, and other loan originators are generally required to obtain a State license. Regulation H, 12 CFR part 1008, which implements SAFE Act standards applicable to State licensing, provides that a State is not required to impose licensing requirements on loan originators who are employees of a bona fide non-profit organization. 12 CFR 1008.103(e)(7). Individuals who are subject to SAFE Act registration or State licensing are required to obtain a unique identification number from the NMLSR, which is a system and database for registering, licensing, and tracking loan originators.

SAFE Act licensing is implemented by States. To grant an individual a SAFE Act-compliant loan originator license, the State must determine that the individual has never had a loan originator license revoked; has not been convicted of enumerated felonies within specified timeframes; has demonstrated financial responsibility, character, and fitness; has completed eight hours of pre-licensing classes that have been approved by the NMLSR; has passed a written test approved by the NMLSR; and has met net worth or surety bond requirements. Licensed loan originators must take eight hours of continuing education classes approved by the NMLSR and must renew their licenses annually. Some States impose additional or higher minimum standards for licensing of individual mortgage loan originators under their SAFE Act-compliant licensing regimes. Separately from their SAFE Act-compliant licensing regimes, most States also require licensing or registration of loan originator organizations.

SAFE Act registration generally requires depository institution employee loan originators to submit to the NMLSR identifying information and information about their employment history and certain criminal convictions, civil judicial actions and findings, and adverse regulatory actions. The employee must also submit fingerprints to the NMLSR and authorize the NMLSR and the employing depository institution to obtain a criminal background check and information related to certain findings and sanctions against the employee by a court or government agency. Regulation G, 12 CFR part 1007, which implements SAFE Act registration requirements, imposes an obligation on the employing depository institution to have and follow policies to ensure compliance with the SAFE Act. The policies must also provide for the depository institution to review employee criminal background reports and to take appropriate action consistent with Federal law. 12 CFR 1007.104(h).

Proposed § 1026.36(f) implements, as applicable, TILA section 129B(b)(1)(A)'s mortgage originator licensing, registration, and qualification requirements by requiring a loan originator for a consumer credit transaction to meet the requirements described above. Proposed § 1026.36(f) tracks the TILA requirement that mortgage originators comply with State and Federal licensing and registration requirements, including those of the SAFE Act. Proposed comment 36(f)–1 notes that the definition of loan originator includes individuals and organizations and, for purposes of § 1026.36(f), includes creditors. Comment 36(f)–2 clarifies that § 1026.36(f) does not affect the scope of individuals and organizations that are subject to State and Federal licensing and registration requirements. The remainder of § 1026.36(f) sets forth standards that loan originator organizations must meet to comply with the TILA requirement that they be qualified, as discussed below. Section 1026.36(f) clarifies that the requirements do not apply to government agencies and State housing finance agencies, employees of which are not required to be licensed under the SAFE Act. This differentiation is made pursuant to the Bureau's authority under TILA section 105(a) to effectuate the purposes of TILA, which as provided in TILA section 129B(a)(2) include assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive. The Bureau does not believe that it is proper to apply the proposed qualification requirements to these individuals, because such agencies directly regulate and control the manner of all of their loan origination activities, thereby providing consumers adequate protection from these types of harm.

36(f)(1)

Proposed § 1026.36(f)(1) requires loan originator organizations to comply with applicable State law requirements for legal existence and foreign qualification, meaning the requirements that govern the legal creation of the organization and the authority of the organization to transact business in another State. Proposed comment 36(f)(1)–1 states, by way of example, that the provision encompasses requirements for incorporation or other type of formation and for maintaining an agent for service of process. This requirement would help ensure that consumers are able to seek remedies against loan originator organizations that fail to comply with requirements for legal formation and, when applicable, for operating as foreign businesses.

36(f)(2)

Proposed § 1026.36(f)(2) requires loan originator organizations to ensure that their individual loan originators are in compliance with SAFE Act licensing and registration requirements. Proposed comment 36(f)(2)–1 notes that the loan

originator organization can comply with the requirement by verifying information that is available on the NMLSR consumer access Web site.

36(f)(3)

Proposed § 1026.36(f)(3) provides actions that a loan originator organization must take for its individual loan originators who are not required to be licensed, and are not licensed, pursuant to the SAFE Act and State SAFE Act implementing laws. Individual loan originators who are not required to be licensed generally include employees of depository institutions and organizations that a State has determined to be bona fide non-profit organizations, in accordance with criteria in Regulation H. 12 CFR 1008.103(e)(7).

The proposed requirements in § 1026.36(f)(3)(ii) apply to unlicensed individual loan originators two of the core standards that apply to individuals who are subject to SAFE Act State licensing requirements: the criminal background standards and the financial responsibility, character, and general fitness standards. Proposed § 1026.36(f)(3)(iii) also requires loan originator organizations to provide periodic training to these individual loan originators, a requirement that is analogous to but, as discussed below, more flexible than the continuing education requirement that applies to individuals who have SAFE Act-compliant State licenses.

The SAFE Act's application of the less stringent registration standards to employees of depository institutions, as well as Regulation H's provision for States to exempt from State licensing employees of bona fide non-profit organizations, are based in part on an assumption that these institutions carry out basic screening of and provide basic training to their employee loan originators to comply with prudential regulatory requirements or to ensure a minimum level of protection of and service to their borrowers. The proposed requirements in § 1026.36(f)(3) would help ensure that all individual loan originators meet core standards of integrity and competence, regardless of the type of loan originator organization for which they work.

The proposal does not require employers of unlicensed loan originator individuals to obtain the covered information and make the required determinations on a periodic basis. Instead, such employers would be required to obtain the information and make the determinations under the criminal, financial responsibility, character, and general fitness standards before an individual acts as a loan originator in a covered consumer credit transaction. However, the Bureau invites public comment on whether such determinations should be required on a periodic basis or whether the employer of an unlicensed loan originator should be required to make subsequent determinations only when it obtains information that indicates the individual may no longer meet the applicable standards.

The Bureau is not proposing to apply to employees of depository institutions and bona fide non-profit organizations the more detailed requirements to pass a standardized test and to be covered by a surety bond that apply to individuals seeking a SAFE Act-compliant State license. The Bureau has not found evidence that consumers who obtain mortgage loans from depository institutions and bona fide non-profit organizations face risks that are not adequately addressed through existing safeguards and proposed safeguards in this proposed rule. However, the Bureau will continue to monitor the market to consider whether additional measures are warranted.

36(f)(3)(i)

Proposed § 1026.36(f)(3)(i) provides that the loan originator organization must obtain, for each individual loan originator who is not licensed under the SAFE Act, a State and national criminal background check, a credit report from a nationwide consumer reporting agency in compliance, where applicable, with the requirements of section 604(b) of the Fair Credit Reporting Act (15 U.S.C. 1681b), and information about any administrative, civil, or criminal findings by any court or government agency. Proposed comment 36(f)(3)(i)–1 clarifies that loan originator organizations that do not have access to this information in the NMLSR (generally, bona fide non-profit organizations) could satisfy the requirement by obtaining a criminal background check from a law enforcement agency or commercial service. Such a loan originator organization could satisfy the requirement to obtain information about administrative, civil, or criminal determinations by requiring the individual to provide it with this information. The Bureau notes that the information in the NMLSR about administrative, civil, or criminal determinations about an individual is generally supplied to the NMLSR by the individual, rather than by a third party. The Bureau invites public comment on whether loan originator organizations that do not have access to this information in the NMLSR should be permitted to satisfy the requirement by requiring the individual loan originator to provide it directly to the loan originator organization or if, instead, there are other means of obtaining the information that are more reliable or efficient.

36(f)(3)(ii)

Proposed § 1026.36(f)(3)(ii) specifies the standards that a loan originator organization must apply in reviewing the information it is required to obtain. The standards are the same as those that State agencies must apply in determining whether to grant an individual a SAFE Act-compliant loan originator license. Proposed comment 36(f)(3)(ii)–1 clarifies that the scope of the required review includes the information required to be obtained under § 1026.36(f)(3)(i) as well information the loan originator organization has obtained or would obtain as part of its customary hiring and personnel management practices, including information from application forms, candidate interviews, and reference checks.

First, under proposed § 1026.36(f)(3)(ii)(A), a loan originator organization must determine that the individual loan originator has not been convicted (or pleaded guilty or *nolo contendere*) to a felony involving fraud, dishonesty, a breach of trust, or money laundering at any time, or any other felony within the preceding seven-year period. Depository institutions already apply similar standards in complying with the SAFE Act registration requirements under 12 CFR 1007.104(h) and other applicable Federal requirements, which generally prohibit employment of individuals convicted of offenses involving dishonesty, money laundering, or breach of trust. For depository institutions, the incremental effect of the proposed standard generally would be to expand the scope of disqualifying crimes to include felonies other than those involving dishonesty, money laundering, or breach of trust if the conviction was in the previous seven years. The Bureau does not believe that depository institutions or bona fide non-profit organizations currently employ many individual loan originators who would be disqualified by the proposed provision, but the proposed provision would give consumers confidence that individual loan originators meet common minimum criminal background standards, regardless of the type of institution or organization for which they work. The proposed description of potentially disqualifying convictions is

the same as that in the SAFE Act provision that applies to applicants for State licenses and includes felony convictions in foreign courts. The Bureau recognizes that records of convictions in foreign courts may not be easily obtained and that many foreign jurisdictions do not classify crimes as felonies. The Bureau invites public comment on what, if any, further clarifications the Bureau should provide for this provision.

Second, under proposed § 1026.36(f)(3)(ii)(B), a loan originator organization must determine that the individual loan originator has demonstrated financial responsibility, character, and general fitness to warrant a determination that the individual loan originator will operate honestly, fairly, and efficiently. This standard is identical to the standard that State agencies apply to applicants for SAFE Act-compliant loan originator licenses, except that it does not include the requirement to determine that the individual's financial responsibility, character, and general fitness ''such as to command the confidence of the community.'' The Bureau believes that responsible depository institutions and bona fide non-profit organizations already apply similar standards when hiring or transferring any individual into a loan originator position. The proposed requirement formalizes this practice and ensures that the determination considers reasonably available, relevant information so that, as with the case of the proposed criminal background standards, consumers can be confident that all individual loan originators meet common minimum qualification standards for financial responsibility, character, and general fitness. Proposed comment 36(f)(3)(ii)(B)–1 clarifies that the review and assessment need not include consideration of an individual's credit score but must include consideration of whether any of the information indicates dishonesty or a pattern of irresponsible use of credit or of disregard of financial obligations. As an example, the comment states that conduct revealed in a criminal background report may show dishonest conduct, even if the conduct did not result in a disqualifying felony conviction. It also distinguishes delinquent debts that arise from extravagant spending from those that arise, for example, from medical expenses. The Bureau's view is that an individual with a history of dishonesty or a pattern of irresponsible use of credit or of disregard of financial obligations should not be in a position to interact with or influence consumers in the loan origination process, during which consumers must decide whether to assume a significant financial obligation and determine which of any presented mortgage options is appropriate for them.

The Bureau recognizes that, even with guidance in the proposed comment, any standard for financial responsibility, character, and general fitness inherently includes a subjective component. During the Small Business Review Panel process, some SERs expressed concern that the proposed standard could lead to uncertainty whether a loan originator organization was meeting the standard. The proposed standard excludes the phrase ''such as to command the confidence of the community'' to reduce the potential for this uncertainty. Nonetheless, in light of the civil liability imposed under TILA, the Bureau invites public comment on how to address this concern while also ensuring that the loan originator organization's review of information is sufficient to protect consumers. For example, if a loan originator organization reviews the required information and documents a rational explanation for why relevant negative information does not show that the standard is violated, should the provision provide a presumption that the loan originator organization has complied with the requirement?

36(f)(3)(iii)

In addition to the screening requirements discussed above, proposed § 1026.36(f)(3)(iii) requires loan originator organizations to provide periodic training to its individual loan originators who are not licensed under the SAFE Act. The training must cover the Federal and State law requirements that apply to the individual loan originator's loan origination activities. The proposed requirement is analogous to, but more flexible than, the continuing education requirement that applies to loan originators who are subject to SAFE Act licensing. Whereas the SAFE Act requires licensed individuals to take eight hours of preapproved classes every year, the proposed requirement is intended to be flexible to accommodate the wide range of loan origination activities in which covered loan originator organizations engage and for which covered individuals are responsible. For example, the training provision applies to a large depository institution providing complex mortgage loan products as well as a non-profit organization providing only basic home purchase assistance loans secured by a second lien on a dwelling. The proposed provision also recognizes that covered individuals already possess a wide range of knowledge and skill levels. Accordingly, it would require loan originator organizations to provide training to close any gap in the individual loan originator's knowledge of Federal and State law requirements that apply to the individual's loan origination activities.

The proposed requirement also differs from the analogous SAFE Act requirement in that it does not include a requirement to provide training on ''ethical standards,'' beyond those that amount to State or Federal legal requirements. In light of the civil liability imposed under TILA, the Bureau invites public comment on whether there exist loan originator ethical standards that are sufficiently concrete and widely applicable such that loan originator organizations would be able to determine what subject matter must be included in the required training, if the Bureau were to include ethical standards in the training requirement.

Proposed comment 36(f)(3)(iii)–1 includes explanations of the training requirement and also describes the flexibility available under § 1026.36(f)(3)(iii) regarding how the required training is delivered. It clarifies that training may be delivered by the loan originator organization or any other party through online or other technologies. In addition, it states that training that a Federal, State, or other government agency or housing finance agency has approved or deemed sufficient for an individual to originate loans under a program sponsored or regulated by that agency is presumptively sufficient to meet the proposed requirement. It further states that training approved by the NMLSR to meet the continuing education requirement applicable to licensed loan originators is sufficient to meet the proposed requirement to the extent that the training covers the types of loans the individual loan originator originates and applicable Federal and State laws and regulations. The proposed comment recognizes that many loan originator organizations already provide training to their individual loan originators to comply with requirements of prudential regulators, funding agencies, or their own operating procedures. Thus, the proposed comment clarifies that § 1026.36(f)(3)(iii) does not require training that is duplicative of training that loan originator organizations are already providing if that training meets the standard in § 1026.36(f)(3)(iii). These clarifications are intended to respond to questions that SERs raised

during the Small Business Review Panel process discussed above.

36(g) NMLSR Identification Number on Loan Documents

TILA section 129B(b)(1)(A), which was added by Dodd-Frank Act section 1402(b), authorizes the Bureau to issue regulations requiring mortgage originators to include on all loan documents any unique identifier issued by the NMLSR (also referred to as an NMLSR ID). Individuals who are subject to SAFE Act registration or State licensing are required to obtain an NMLSR ID, and many organizations also obtain NMLSR IDs pursuant to State or other requirements. Proposed § 1026.36(g) incorporates the requirement that mortgage originators must include their NMLSR ID on loan documents while providing several clarifications. The Bureau believes that the purpose of the statutory requirement is not only to permit consumers to look up the loan originator's record on the consumer access Web site of the NMLSR (*www.nmlsconsumeraccess.org*) before proceeding further with a mortgage transaction, but also to help ensure accountability of loan originators both before and after a transaction has been originated.

36(g)(1)

Proposed § 1026.36(g)(1)(i) and (ii) provides that loan originators must include both their NMLSR IDs and their names on loan documents, because without the associated names, a consumer may not understand whom or what the NMLSR ID number serves to identify. Having the loan originator's name may help consumers understand that they have the opportunity to assess the risks associated with a particular loan originator in connection with the transaction, which in turn promotes the informed use of credit (consistent with TILA section 105(a)'s provision for additional requirements that are necessary or proper to effectuate the purposes of TILA or to facilitate compliance with TILA). These provisions also clarify, consistent with the statutory requirement that mortgage originators include ''any'' NMLSR ID, that the requirement applies if the organization or individual loan originator has ever been issued an NMLSR ID. Proposed § 1026.36(g)(1) also provides that the NMLSR IDs must be included each time any of these documents are provided to a consumer or presented to a consumer for signature. Proposed comment 36(g)(1)–1 notes that for purposes of § 1026.36(g), creditors are not excluded from the definition of ''loan originator.'' Proposed comment 36(g)(1)–2 clarifies that the requirement applies regardless of whether the organization or individual loan originator is required to obtain an NMLSR ID under the SAFE Act or otherwise. Proposed § 1026.36(g)(1)(ii) recognizes that there may be transactions in which more than one individual meets the definition of a loan originator and clarifies that the individual loan originator whose NMLSR ID must be included is the individual with primary responsibility for the transaction at the time the loan document is issued.

In its 2012 TILA–RESPA Integration Proposal, the Bureau is proposing to integrate TILA and RESPA mortgage disclosure documents, in accordance with section 1032(f) of the Dodd-Frank Act, 12 U.S.C. 5532(f). That separate rulemaking also addresses inclusion of NMLSR IDs on the integrated disclosures it proposes, as well as the possibility that in some circumstances more than one individual may meet the criteria for whose NMLSR ID must be included. To ensure harmonization between the two rules, proposed comment 36(g)(1)(ii)–1 states that under these circumstances, an individual loan originator may comply with the requirement in § 1026.36(g)(1)(ii) by complying with the applicable provision governing disclosure of NMLSR IDs in rules issued by the Bureau pursuant to Dodd-Frank Act section 1032(f).

36(g)(2)

Proposed § 1026.36(g)(2) identifies the documents that must include loan originators' NMLSR IDs as the application, the disclosure provided under section 5(c) of the Real Estate Settlement Procedures Act of 1974 (RESPA), the disclosure provided under TILA section 128, the note or loan contract, the security instrument, and the disclosure provided to comply with section 4 of RESPA. Proposed comment 36(g)(2)–1 clarifies that the NMLSR ID must be included on any amendment, rider, or addendum to the note or loan contract or security instrument. These clarifications are provided in response to concerns that SERs expressed in the Small Business Review Panel process that the statutory reference to ''all loan documents'' would lead to uncertainty as to what is or is not considered a ''loan document.'' The proposed scope of the requirement's coverage is intended to ensure that loan originators' NMLSR IDs are included on documents that include the terms or prospective terms of the transaction or borrower information that the loan originator may use to identify loan terms that are potentially available or appropriate for the consumer. To the extent that any document not listed in § 1026.36(g)(2) is arguably a ''loan document,'' differentiation as to which documents must include loan originators' NMLSR IDs is consistent with TILA section 105(a), which allows the Bureau to make exceptions that are necessary or proper to effectuate the purposes of TILA or to facilitate compliance with TILA.

A final rule implementing the proposed requirements to include NMLSR IDs on loan documents may be issued, and may generally become effective, prior to the effective date of a final rule implementing the Bureau's 2012 TILA–RESPA Integration Proposal. If so, then the requirement to include the NMLSR ID would apply to the current Good Faith Estimate, Settlement Statement, and TILA disclosure until the issuance of the integrated disclosures. The Bureau recognizes that such a sequence of events might cause loan originator organizations to have to incur the cost of adjusting their systems and procedures to accommodate the NMLSR IDs on the current disclosures, even though those disclosures will be replaced in the future by the integrated disclosures. Accordingly, the Bureau invites public comment on whether the effective date of the provisions regarding inclusion of the NMLSR IDs on the RESPA and TILA disclosures should be delayed until the date that the integrated disclosures are issued.

36(g)(3)

Proposed § 1026.36(g)(3) defines ''NMLSR identification number'' as a number assigned by the NMLSR to facilitate electronic tracking of loan originators and uniform identification of, and public access to, the employment history of, and the publicly adjudicated disciplinary and enforcement actions against, loan originators. The definition is consistent with the definition of ''unique identifier'' in section 1503(12) of the SAFE Act, 12 U.S.C. 5102(12).

36(h) Prohibition on Mandatory Arbitration Clauses and Waivers of Certain Consumer Rights

Section 1414 of the Dodd-Frank Act added TILA section 129C(e), which prohibits certain transactions secured by a dwelling from requiring arbitration or any other non-judicial procedure as the method for resolving disputes arising from the transaction. The same provision provides that a consumer and creditor or their assignees may nonetheless agree, after a dispute arises, to use arbitration or other non-judicial

procedure to resolve the dispute. It further provides, however, that no covered transaction secured by a dwelling, and no related agreement between the consumer and creditor, may limit a consumer's ability to bring a claim in connection with any alleged violation of Federal law. As a result, even a post-dispute agreement to use arbitration or other non-judicial procedure must not limit a consumer's right to bring a claim in connection with any alleged violation of Federal law, thus the consumer must be able to bring any such claim through the agreed-upon non-judicial procedure. The provision does not address State law causes of action. Proposed § 1026.36(h) codifies these statutory provisions.

36(i) Prohibition on Financing Single-Premium Credit Insurance

Dodd-Frank Act section 1414 added TILA section 129C(d), which generally prohibits a creditor from financing any premiums or fees for credit insurance in connection with certain transactions secured by a dwelling. The same provision provides that the prohibition does not apply to credit insurance for which premiums or fees are calculated and paid in full on a monthly basis. The prohibition applies to credit life, credit disability, credit unemployment, credit property insurance, and other similar products. It does not apply, however, to credit unemployment insurance for which the premiums are reasonable, the creditor receives no compensation, and the premiums are paid pursuant to another insurance contract and not to the creditor's affiliate. Proposed § 1026.36(i) codifies these statutory provisions. Rather than repeating Dodd-Frank Act section 1414's list of covered credit insurance products, it cross-references the existing description of insurance products in § 1026.4(d)(1) and (3). The Bureau does not intend any substantive change to the statutory provision's scope of coverage. The Bureau believes that these provisions are straightforward enough that they require no further clarification. The Bureau requests comment, however, on whether any issues raised by the provision require clarification and, if so, how they should be clarified. The Bureau also solicits comment on when the provision should become effective, for example, 30 days following publication of the final rule, or at a later time.

36(j)

Scope of § 1026.36

The Bureau proposes to transfer § 1026.36(f) to new § 1026.36(j). Moving the section accommodates new § 1026.36(f), (g), (h) and (i). The Bureau also proposes to amend § 1026.36(j) to reflect the scope of coverage for the proposals implementing TILA sections 129B (except for (c)(3)) and 129C(d) and (e), as added by sections 1402, 1403, 1414(d) and (e) of the Dodd-Frank Act as discussed further below.

The Bureau proposes to implement the scope of products covered in TILA section 129C(d) and (e) (the new arbitration and single-premium credit insurance provisions proposed in § 1026.36(h) and (i)) by amending § 1026.36(j) to state that § 1026.36(h) and (i) applies both to HELOCs subject to § 1026.40 and closed–end consumer credit transactions, secured by the consumer's principal dwelling. The Bureau further proposes to implement the scope of coverage in TILA section 129B(b) (the new qualification, document identification and compliance procedure requirements proposed in new § 1026.36(f) and (g)) by amending § 1026.36(j) to include § 1026.36(f) and (g) with the coverage applicable to § 1026.36(d) and (e). That is, § 1026.36(d), (e), (f) and (g) applies to closed-end consumer credit transactions secured by a dwelling (as opposed to the consumer's principal dwelling). The Bureau does not propose amending the scope of transactions covered by § 1026.36(d) and (e).

The Bureau also proposes to make technical revisions to comment 36–1 reflecting these scope-of-coverage amendments proposed in § 1026.36(j). The Bureau relies on its interpretive authority under TILA section 105(a) to the extent there is ambiguity in TILA sections 129B (except for (c)(3)) and 129C(d) and (e), as added by sections 1402, 1403, 1414(d) and (e) of the Dodd-Frank Act, regarding which provisions apply to different types of transactions.

Consumer Credit Transaction Secured by a Dwelling

The definition of ''mortgage originator'' in TILA section 103(cc)(2) applies to activities related to a ''residential mortgage loan'' only. TILA section 103(cc)(5) defines ''residential mortgage loan'' as:

> any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 129B and 129C and section 128(a) (16), (17), (18), and (19), and sections 128(f) and 130(k), and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.

The Bureau does not propose to use the statutory term ''residential mortgage loan'' in § 1026.36. Section 1026.36 uses the term ''consumer credit transaction'' throughout and proposed § 1026.36(j) qualifies the scope of § 1026.36's provisions. The Bureau believes that changing the terminology of ''consumer credit transaction'' to ''residential mortgage loan'' is unnecessary because the same meaning will be preserved.

Dwelling

The Bureau believes the definition of ''dwelling'' in § 1026.2(a)(19) is consistent with TILA section 103(cc)(5)'s use of the term in the definition of ''residential mortgage loan.'' Section 1026.2(a)(19) defines ''dwelling'' to mean ''a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.'' The Bureau interprets the term ''dwelling'' to also include dwellings in various stages of construction. Construction loans are often secured by dwellings in this fashion. Indeed, draws to fund construction are usually released in phases as the dwelling comes into existence and secures the draws. Thus, a construction loan secured by an improvement through various stages of construction that will be used as a residence is secured by a ''dwelling.'' The Bureau proposes to maintain this definition of dwelling.

VI. Implementation

A. This Proposal

Section 1400(c)(1) of the Dodd-Frank Act mandates that the Bureau prescribe implementing regulations in final form by January, 21, 2013 (*i.e.,* the date that is 18 months after the ''designated transfer date'') for regulations that are required under title XIV of the Dodd-Frank Act, and the Bureau must set effective dates of these regulations no later than one year from their date of issuance. The regulations proposed in this notice for which proposed rule text is set forth, while implementing amendments under title XIV of the Dodd-Frank Act, are not regulations required under title XIV.[71] Pursuant to

[71] As noted above in the section-by-section analysis, this proposal would implement TILA sections 129B(b)(1), (c)(1), and (c)(2), and 129C(d) and (e). The only provisions of TILA section 129B that are required to be implemented by regulations are those in section 129B(b)(2) and (c)(3). Section 129B(b)(2), for which the Bureau has not set forth proposed rule text but which the Bureau may

Continued

section 1400(c)(2) of the Dodd-Frank Act, the final rule issued under this proposal will establish its effective date, which need not be within one year of issuance.[72]

The Bureau recognizes the importance of the changes to be made by the Bureau's final rule for consumer protection and the need to put these changes into place for consumers. For example, mandating that creditors make available a loan without discount points and origination points or fees may help ensure that consumers can shop effectively among different creditors and get a reasonable value for discount points and origination points or fees. In addition, an individual loan originator who has been properly screened and trained to present the type of loan that the individual loan originator sells is a clear benefit to consumers. The Bureau believes consumers should have the benefit of the Dodd-Frank Act's additional protections and requirements as soon as practical.

The Bureau also recognizes, however, that loan originators and creditors will need time to make systems changes and to retrain their staff to address the Dodd-Frank Act provisions implemented through the Bureau's final rule, including the requirement to make available in certain circumstances a loan without discount points and origination points or fees. Moreover, certain creditors and loan originator organizations will need to conduct training and screening for individual loan originators. The Bureau further recognizes that mortgage creditors and loan originators will need to make changes to address a number of other requirements relating to other Dodd-Frank Act provisions, some of which, unlike the requirements set out in the proposed rule text for this rulemaking, are required by the Dodd-Frank Act to take effect within one year after issuance of final implementing rules. The Bureau believes that ensuring that industry has sufficient time to make the necessary changes ultimately will benefit consumers through better industry compliance.

The Bureau expects to issue a final rule under this proposal by January 21, 2013 because the statutory provisions it implements otherwise will take effect automatically on that date. The Bureau also expects to issue several other final rules by January 21, 2013 to implement other provisions of title XIV of the Dodd-Frank Act. The Bureau solicits comment on an appropriate implementation period for the final rule, in light of the competing considerations discussed above. The Bureau is especially mindful, however, of the importance of affording consumers the benefits of the additional protections in this proposal as soon as practical and therefore seeks detailed comment, and supporting information, on the nature and length of implementation processes that this rulemaking will necessitate.

B. TILA Section 129B(b)(2)

As noted above, this proposal does not contain specific proposed rule text to implement TILA section 129B(b)(2). That section provides that the Bureau ''shall prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, and subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the [SAFE Act].'' 15 U.S.C. 1639b(b)(2). Nonetheless, the Bureau may adopt such rule text at the same time as the final rule under this proposal. Accordingly, it is describing the rule text it is considering in detail and invites interested parties to provide comment.

Regulations to implement TILA section 129B(b)(2) are required by title XIV. Accordingly, under Dodd-Frank Act section 1400(c)(1), the Bureau must prescribe those regulations no later than January 21, 2013, and those regulations must take effect no later than one year after they are issued. The Bureau notes, however, that TILA section 129B(b)(2) has no practical effect on depository institutions in the absence of implementing regulations because the statute imposes no requirement directly on any person other than the Bureau itself (to make regulations requiring depository institutions to adopt the referenced procedures).

If the Bureau were to make the substantive requirements of this rulemaking implementing TILA section 129B effective more than one year after issuance of the final rule and also were to adopt regulations requiring depository institutions to establish the referenced procedures (which must take effect within one year of their issuance), depository institutions might appear to be required to establish and maintain procedures to ensure compliance with substantive regulatory requirements that have not yet taken effect.[73] This incongruous result would not impose any practical requirements on depository institutions until the substantive regulatory requirements take effect. Nevertheless, the Bureau is concerned that depository institutions may experience considerable uncertainty and compliance burden in attempting to reconcile a currently effective requirement for procedures with its corresponding, but not yet effective, substantive requirements. Therefore, the Bureau sees no practical reason to put into effect a requirement for procedures, with no practical consequences and possible negative consequences for depository institutions, until the substantive requirements to which it relates take effect.

On the other hand, if the Bureau were to make the substantive requirements of this rulemaking implementing TILA section 129B effective one year or less after issuance, the Bureau could require depository institutions simultaneously to establish and maintain procedures to ensure compliance with those substantive requirements without creating the incongruity discussed above. The Bureau is aware that depository institutions generally establish and maintain procedures to ensure compliance with all regulatory requirements to which they are subject, as a matter of standard compliance practice. Thus, the Bureau believes that regulations implementing TILA section 129B(b)(2), when adopted by the Bureau, will impose a relatively routine and familiar obligation on depository institutions and therefore could consist of a straightforward rule paralleling the statutory language.

Specifically, the Bureau expects that such a rule would require depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of themselves, their subsidiaries, and the employees of both with the requirements of § 1026.36(d), (e), (f), and (g). The rule would provide further that the required procedures must be appropriate to the nature, size, complexity, and scope of the mortgage credit activities of the depository institution and its subsidiaries. Finally, consistent with the definitions in

implement in the final rule, is discussed in more detail in part VI.B, below.

[72] If the Bureau does not issue implementing regulations by January 21, 2013, however, the Dodd-Frank Act amendments of title XIV generally will go into effect on January 21, 2013. *See* Dodd-Frank Act section 1400(c)(3).

[73] TILA section 129B(b)(2) mandates that the Bureau issue regulations to require procedures to assure and monitor compliance with ''this section,'' which is a reference to section 129B, not the regulations implementing section 129B. But Dodd-Frank Act section 1400(c)(2) provides that the statutory provisions in title XIV take effect when the final regulations implementing them take effect, provided such regulations are issued by January 21, 2013.

section 2(18) of the Dodd-Frank Act, 12 U.S.C. 5301(18), the rule would define ''depository institution'' and ''subsidiary'' for this purpose to have the same meanings as in section 3 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1813.

The Bureau notes that the definitions in section 2(18) of the Dodd-Frank Act should not necessarily determine the meanings of the ambiguous terms in TILA section 129B(b)(2). The Dodd-Frank Act definitions apply, ''[a]s used in this Act,'' not necessarily as used in another statute, TILA, being amended by the Dodd-Frank Act. In addition, the Dodd-Frank Act definitions do not apply if ''the context otherwise requires.'' One of the substantive requirements to which TILA section 129B(b)(2) applies concerns the registration procedures under section 1507 of the SAFE Act. The SAFE Act provides that, for purposes of the SAFE Act: ''The term 'depository institution' has the same meaning as in [12 U.S.C. 1813], and includes any credit union.'' 12 U.S.C. 5102(2). It may therefore be appropriate in this context to apply the SAFE Act definition of ''depository institution'' either as an interpretation of TILA section 129B(b)(2) or as an exercise of the Bureau's authority under TILA section 105(a). Applying the SAFE Act definition in this way could facilitate compliance by aligning the definition of ''depository institution'' applicable to the procedures requirement under TILA section 129B(b)(2) with the definition of ''depository institution'' applicable under the SAFE Act. Applying the SAFE Act definition in this way also could be necessary or proper to effectuate the purpose stated in TILA section 129B(a)(2) of assuring that consumers are offered and receive residential mortgage loans that are not unfair, deceptive, or abusive.

The Bureau also notes that Regulation G, which implements the SAFE Act, contains a requirement that all covered financial institutions (including banks, savings associations, Farm Credit System institutions, and certain subsidiaries) adopt and follow certain policies and procedures related to SAFE Act requirements. 12 CFR 1007.104. Accordingly, a regulation implementing TILA section 129B(b)(2) to require procedures could also apply to credit unions, as well as Farm Credit System institutions, as an exercise of the Bureau's authority under TILA section 105(a). Extending the TILA section 129B(b)(2) procedures requirement in this way may facilitate compliance by aligning the scope of the entities subject to the TILA and SAFE Act procedures requirements. Further, such an extension may be necessary or proper to effectuate the purpose stated in TILA section 129B(a)(2) of assuring that consumers are offered and receive residential mortgage loans that are not unfair, deceptive, or abusive.

The Bureau further notes that under Regulation G only certain subsidiaries (those that are ''covered financial institutions'') are required by 12 CFR 1007.104 to adopt and follow written policies and procedures designed to assure compliance with Regulation G. Accordingly, it may be appropriate to apply the duty to assure and monitor compliance of subsidiaries and their employees under TILA section 129B(b)(2) only to subsidiaries that are covered financial institutions under Regulation G. Exercising TILA 105(a) authority to make an adjustment or exception in this way may facilitate compliance by aligning the scope of the subsidiaries covered by the TILA and SAFE Act procedures requirements.

Finally, extending the scope of a regulation requiring procedures even further, to apply to other loan originators that are not covered financial institutions under Regulation G (such as independent mortgage companies), would help ensure consistent consumer protections and a level playing field. Exercising TILA section 105(a) authority in this way may be necessary or proper to effectuate the purpose stated in TILA section 129B(a)(2) of assuring that consumers are offered and receive residential mortgage loans that are not unfair, deceptive, or abusive.

The Bureau therefore solicits comment on whether a regulation requiring procedures to comply with TILA section 129B also should apply only to depository institutions as defined in section 3 of the FDIA, or also to credit unions, other covered financial institutions subject to Regulation G, or any other loan originators such as independent mortgage companies. Additionally, the Bureau solicits comment on whether it should apply the duty to assure and monitor compliance of subsidiaries and their employees only with respect to subsidiaries that are covered financial institutions under Regulation G. With respect to all of the foregoing, the Bureau also solicits comment on whether any of the potential exercises of TILA section 105(a) authority should apply with respect to procedures concerning only SAFE Act registration, or with respect to procedures for all the duty of care requirements in TILA section 129B(b)(1), or with respect to procedures for all the requirements of TILA section 129B, including those added by section 1402 of the Dodd-Frank Act.

The Bureau also recognizes that a depository institution's failure to establish and maintain the required procedures under the implementing regulation would constitute a violation of TILA, thus potentially resulting in significant civil liability risk to depository institutions under TILA section 130. 15 U.S.C. 1640. The Bureau anticipates concerns on the part of depository institutions regarding their ability to avoid such liability risk and therefore seeks comment on the appropriateness of establishing a safe harbor that would demonstrate compliance with the rule requiring procedures. For example, such a safe harbor might provide that a depository institution is presumed to have met the requirement for procedures if it, its subsidiaries, and the employees of it and its subsidiaries do not engage in a pattern or practice of violating § 1026.36(d), (e), (f), or (g).

The Bureau may adopt such a rule requiring procedures at the same time as the final rule under this proposal. If the effective date of the substantive requirements in that final rule is more than one year after issuance, the Bureau could adopt the requirement for procedures but clarify that having no procedures satisfies the procedures requirement until such time as the rule's substantive requirements to which the procedures must relate take effect. Alternatively, the Bureau could refrain from issuing the rule requiring procedures until such time as it can take effect at the same time as the substantive requirements without the need for such a clarification. The Bureau solicits comment, however, on whether the requirement for procedures is straightforward enough to allow implementation by a regulation such as that described above. Alternatively, the Bureau seeks comment on whether the regulation prescribed under TILA section 129B(b)(2) should contain any specific guidance on the necessary procedures beyond that described above.

VII. Dodd-Frank Act Section 1022(b)(2)

In developing the proposed rule, the Bureau has considered potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, the Department of Housing and Urban Development (HUD), and the Federal Trade Commission (FTC) regarding consistency with any prudential,

market, or systemic objectives administered by such agencies.[74]

In this rulemaking, the Bureau proposes to amend Regulation Z to implement amendments to TILA made by the Dodd-Frank Act. The proposed amendments to Regulation Z implement Dodd-Frank Act sections 1402 (new duties of mortgage originators concerning proper qualification, registration, and related requirements), 1403 (limitations on loan originator compensation to reduce steering incentives for residential mortgage loans), and 1414(d) and (e) (restrictions on the financing of single-premium credit insurance products and mandatory arbitration agreements in residential mortgage loan transactions).[75] The proposed rule and commentary would also provide clarification of certain provisions in the existing Loan Originator Final Rule, including guidance on the application of those provisions to certain profit-sharing plans and the appropriate analysis of other payments made to loan originators.

As discussed in part II above, in 2010, the Board and Congress acted to address concerns that certain loan originator compensation arrangements could be difficult for consumers to understand and had the potential to create incentives to steer consumers to transactions with different terms, such as higher interest rates. The proposed rule would continue the protections provided in the Loan Originator Final Rule and implement the additional provisions Congress included in the Dodd-Frank Act that, as described above, to further improve the transparency of mortgage loan originations, enhance consumers' ability to understand loan terms, and afford additional protections to consumers.

A. Provisions To Be Analyzed

The analysis below considers the benefits, costs, and impacts of the following major proposed provisions:

1. New restrictions on discount points and origination points or fees in closed-end consumer credit transactions secured by a dwelling where any person other than the consumer will compensate a loan originator in connection with the transaction. Specifically, in these transactions, a creditor or loan originator organization may not impose on the consumer any upfront discount points and origination points or fees in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points and fees, unless the consumer is unlikely to qualify for such a loan. The term ''comparable, alternative loan'' would mean that the two loans have the same terms and conditions, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such as the amount of the regular periodic payments), and the amount of any discount points and origination points or fees.

2. Clarification of the applicability of the prohibition on payment and receipt of loan originator compensation based on the transaction's terms to employer contributions to qualified profit-sharing and other defined contribution or benefit plans in which individual loan originators participate, and to payment of bonuses under a profit-sharing plan or a contribution to a non-qualified plan.

3. New requirements for loan originators, including requirements related to their licensing, registration, and qualifications, and a requirement to include their identification numbers and names on loan documents.

With respect to each major proposed provision, the analysis considers the benefits and costs to consumers and covered persons. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the proposed rule.

The data with which to quantify the potential benefits, costs, and impacts of the proposed rule are generally limited. For example, a lack of data regarding the specific distribution of loan products offered to consumers limits the precise estimation of the benefits of increased consumer choice. In light of these data limitations, the analysis below provides a mainly qualitative discussion of the benefits, costs, and impacts of the proposed rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Wherever possible, the Bureau has made quantitative estimates based on these principles and the data available.

The Bureau requests comments on the analysis of the potential benefits, costs, and impacts of the proposed rule.

B. Baseline for Analysis

The amendments to TILA in sections 1402, 1403, and 1414(d) and (e) of the Dodd-Frank Act take effect automatically on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date.[76] Specifically, new TILA section 129B(c)(2), which was added by section 1403 of the Dodd-Frank Act and restricts the ability of a creditor, the mortgage originator, or the affiliates of either to collect from the consumer upfront discount points, origination points, or fees in a transaction in which the mortgage originator receives from a person other than the consumer an origination fee or charge, will take effect automatically unless the Bureau exercises its authority to waive or create exemptions from this prohibition. New TILA section 129B(b)(1) requires each mortgage originator to be qualified and include unique identification numbers on loan documents. TILA section 129B(c)(1) prohibits mortgage originators in residential mortgage loans from receiving compensation that varies based on loan terms. TILA section 129C(d) creates prohibitions on single-premium credit insurance, and TILA section 129C(e) provides restrictions on mandatory arbitration agreements. These statutory amendments to TILA also take effect automatically in the absence of the Bureau's regulation.

In some instances, the provisions of the proposed rule would provide substantial benefits compared to allowing the TILA amendments to take effect automatically, by providing exemptions to certain statutory provisions. In particular, the Dodd-Frank Act prohibits consumer payment of upfront points and fees in all loan transactions where someone other than the consumer pays a loan originator compensation tied to the transaction (*e.g.,* a commission). Pursuant to its authority under the Dodd-Frank Act to create exemptions from this prohibition when doing so would be in the interest of consumers and in the public interest, the Bureau's proposed rule would permit consumers to pay upfront points and fees when the creditor also makes available a loan that does not include discount points and origination points or fees (or when the consumer is

[74] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[75] This rulemaking also solicits comment on implementing, possibly in the final rule, new TILA section 129B(b)(2), which was added by Dodd-Frank Act section 1402 and requires the Bureau to prescribe regulations requiring certain loan originators to establish and maintain various procedures. This rulemaking does not implement new TILA section 129B(c)(3) which was added by Dodd-Frank Act section 1403.

[76] Sections 129B(b)(2) and 129B(c)(3) of TILA, as added by sections 1402 and 1403 of the Dodd-Frank Act, however, do not impose requirements on mortgage originators until Bureau implementing regulations take effect.

unlikely to qualify for such loan). In proposing to use its exemption authority, the Bureau is attempting to capture the benefits to consumers from a loan that does not include discount points and origination points or fees (which would be the only loan available if the statute went into effect without use of exception authority), while preserving consumers' ability to choose, and creditors' and loan originator organizations' ability to offer, other loan options.

In other instances, the provisions of the proposed rule would implement the statute more directly. Thus, many costs and benefits of the provisions of the proposed rule would arise largely or entirely from the Dodd-Frank Act and not from the Bureau's proposed provisions. In these cases, the benefits of the proposed rule derive from providing additional clarification of certain elements of the statute. The proposed rule would reduce the compliance burdens on covered persons by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation. Moreover, the costs that these provisions would impose beyond those imposed by the Dodd-Frank Act itself are likely to be minimal.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits, costs, and impacts of the proposed rule relative to the most appropriate baseline. This consideration can encompass an assessment of the benefits, costs, and impacts of the proposed rule solely compared to the state of the world in which the statute takes effect without implementing regulations. For the provisions of the proposed rule where the Bureau is using its exemption authority with respect to an otherwise self-effectuating statute, the Bureau believes that the benefits, costs, and impacts are best measured against such a post-statutory baseline. For the provisions that largely implement the statute or clarify ambiguity in the statute or existing regulations, a pre-statute baseline is used to discuss the benefits, costs and impacts of the proposed rule.

Additionally, the provisions of the proposed rule and commentary that clarify or provide additional guidance on provisions of the Loan Originator Final Rule should not impose additional costs or require changes to the business practices, systems, and operations of covered persons, and in particular those of small entities, beyond those that would already have occurred in order to comply with the current rule.[77] The additional clarity offered by the proposed rule and commentary should in fact lower compliance burden by reducing confusion, expenditures made to interpret the current rule (such as hiring counsel or contacting the regulating or supervising agencies with questions), and diminishing the risk of inadvertent non-compliance.

C. Coverage of the Proposed Rule

The proposed rule applies to loan originators and table-funded creditors (*i.e.,* those who take an application, arrange, offer, negotiate, or otherwise obtain an extension of consumer credit for compensation or other monetary gain). The new qualification, document identification, and compliance procedure requirements also apply to creditors that finance transactions from their own resources. Like current § 1026.36(d) and (e), the proposed new qualification, document identification, and compliance procedure requirements apply to closed-end consumer credit transactions secured by a dwelling (as opposed to the consumer's principal dwelling). The proposed new arbitration and single-premium credit insurance provisions apply to both HELOCs subject to § 1026.40 and closed-end consumer credit transactions secured by the consumer's principal dwelling.

D. Potential Benefits and Costs of the Proposed Rule to Consumers and Covered Persons

1. Restrictions on Discount Points and Origination Points or Fees With the Requirement of Making Available a Comparable, Alternative Loan

The Dodd-Frank Act prohibits consumer payment of upfront points and fees in all residential mortgage loan transactions (as defined in the Dodd-Frank Act) except those where no one other than the consumer pays a loan originator compensation tied to the transaction (*e.g.,* a commission). Pursuant to its authority under the Dodd-Frank Act to create exemptions from this prohibition when doing so would be in the interest of consumers and in the public interest, the Bureau is proposing to require that before a creditor or loan originator organization may impose discount points and origination points or fees on a consumer where someone other than the consumer pays a loan originator transaction-specific compensation, the creditor must make available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.)

In retail transactions, a creditor will be deemed to be making available the comparable, alternative loan that does not include discount points and origination points or fees if, any time prior to a loan application, a creditor that gives a quote specific to the consumer for a loan that includes discount points and origination points or fees also provides a quote for a comparable, alternative loan that does not include those points and fees. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.)[78]

In transactions that involve mortgage brokers, a creditor will be deemed to be making available the comparable, alternative loan that does not include discount points and origination points or fees if the creditor provides mortgage brokers with the pricing for all of the creditor's comparable, alternative loans that do not include those points and fees. Mortgage brokers then would provide quotes to consumers for the loans that do not include discount points and origination points or fees when presenting different loan options to consumers.

Because the Bureau is using its exemption authority with respect to the otherwise self-effectuating provisions regarding points and fees, the analysis measures the benefits, costs, and impacts of this provision of the proposed rule relative to the enactment of the statute alone, *i.e.,* it uses a post-statute baseline. The two portions of the provision are discussed separately: the elimination of restrictions on charging of points and fees in certain transactions is discussed first, followed by the requirement to make available the comparable, alternative loan.

[77] Entities would likely incur some costs, however, in reviewing the new rule and commentary.

[78] The proposed rule also solicits comment on: (1) Whether the rule should instead prohibit a creditor from making available a loan that includes discount points and origination points or fees if the consumer does not also qualify for the comparable, alternative loan that does not include points and fees; (2) whether to revise the Regulation Z advertising rules to require that advertisements that disclose information about loans that include discount points and origination points or fees also include information about the comparable, alternative loans to further facilitate shopping by consumers for loans from different creditors; and (3) whether the creditor should be required to provide a Loan Estimate (*i.e.,* the combined TILA–RESPA disclosure proposed by the Bureau in its TILA–RESPA Integration Proposal), or the first page of the Loan Estimate, for the loan that does not include discount points and origination points or fees to the consumer after application.

a. Restrictions on Discount Points and Origination Points or Fees

Potential Benefits and Costs to Consumers

In any mortgage transaction, the consumer has the option to prepay the loan and exit the existing contract. This option to repay has some inherent value to the consumer and imposes a cost on the creditor.[79] In particular, consumers usually pay for part of this option through one of three alternative means: (1) ''discount points,'' which are the current payment of the value of future interest; (2) a ''prepayment penalty,'' which is a payment of the same market value deferred until the time at which the loan balance is actually repaid; or (3) a higher coupon rate on the loan.

In many instances, creditors or loan originators will charge consumers an origination point or fee. This upfront payment is meant to cover the labor and material costs the originator incurs from processing the loan. Here too, the loan originator could offer the consumer a loan with a higher interest rate in order to recover the creditor's costs. In this sense, discount points and origination points or fees are similar; from the consumer's perspective, they are various upfront charges the consumer may pay where the possibility may exist to trade some or all of this payment in exchange for a higher interest rate.

By permitting discount points under certain circumstances, the Bureau's proposed rule offers all consumers greater choice over the terms of the coupon payments on their loan and a choice between paying discount points or a higher rate for the purchase of the prepayment option embedded in the loan.[80] The purchase of discount points, however, is essentially a calculated best guess by a consumer given an uncertain outcome. In this context, the purchase of discount points will not necessarily result in a benefit to the consumer after the consummation of the transaction. Rational consumers presumably purchase discount points because they expect to make loan payments for a long enough period to make a positive return. The occurrence of unanticipated events, however, could induce these consumers to pay off their loan after a shorter period, resulting in a realized loss.[81]

Greater choice over loan terms and greater choice over how to pay for the prepayment option should, under normal circumstances, increase the *ex ante* welfare of consumers. However, the degree to which individual consumers benefit will depend on their individual circumstances and their relative degree of financial acuity.[82] Any *ex post* changes in aggregate benefits and changes in the overall volume of available credit also depend on consumers' circumstances and abilities.

The choice over the means by which consumers compensate creditors for the prepayment option is of particular potential benefit to consumers who currently enjoy high liquidity but who either face prospects of diminished liquidity in the future or are more sensitive to the risk posed by a high variance in their future income or wealth. Examples of such consumers include retiring or older individuals wishing to secure their future housing, individuals who are otherwise predisposed to use their wealth for a one-time payment, consumers with relocation funds available, and consumers offered certain rebates by developers or other sellers.

Relative to permitting the statutory provision to go into effect unaltered, the Bureau's proposed rule regarding upfront points and fees also provides the potential for an additional benefit to consumers when adverse selection in the mortgage market compounds the costs of uncertainty over early repayment. Consumers who buy discount points credibly signal to creditors that the expected maturity of their loans is longer than those loans taken out by consumers not purchasing points. Credible signaling by an individual consumer in this circumstance would result in the consumer being offered a rate below that obtained by purchasing discount points in a more efficient market. When creditors confirm the relationship between individual purchases of discount points and the rapidity of individual prepayment, they respond by offering a lower average rate on each class of mortgages over which creditors have discretion in pricing.[83]

If having to understand and decide among loans with different points and fees combinations imposes a burden on some consumers, the existence of the increased choice made available by this provision may itself be a cost.[84] In these circumstances, the Bureau's proposed exercise of its exemption authority would have the cost of not reducing this confusion, relative to the statute. However, the proposed rule also includes, and solicits comment on, a ''bona fide'' requirement to ensure that consumers receive value in return for paying discount points and origination points or fees and different options for structuring such a requirements. Implementing a requirement that the payment of discount points and origination points or fees be bona fide may benefit these consumers who, in the absence of such a provision, would incur these costs from the increased choice. In essence, by guaranteeing that any points and fees be bona fide, the proposed rule would offer some additional protection for these consumers.

[79] Should they expect to pay the balance of their loan prior to maturity, consumers can purchase from creditors the sole right to choose the date of this payoff. This right is valuable and its price is the market value such a sale creates for creditors in regard to the date of this potential payoff. Bond markets often exhibit an exactly opposite trade, in which the borrower cedes to the creditor the choice of time at which the creditor can require, if it chooses, the borrower to remit the remaining value of the bond. Bonds including such trades are termed ''callable.''

[80] The two options are not mutually exclusive. In some transactions, consumers may pay for the embedded option through more than one of the methods outlined. Donald Keenan & James J Kau, *An Overview of the Option-Theoretic Pricing of Mortgages,* 6 Journal of Housing Research 217 (1995) (providing an overview of options embedded in residential mortgages); James J Kau, Donald Keenan, Walter Muller & James Epperson, *A Generalized Valuation Model for Fixed-Rate Mortgages with Default and Prepayment,* 11 Journal of Real Estate Finance & Economics 5 (1995) (providing a traditional method to value these options numerically); Robert R. Jones and David Nickerson, *Mortgage Contracts, Strategic Options and Stochastic Collateral,* 24 Journal of Real Estate Finance & Economics 35 (2002) (generating numerical values, in current dollars, for option-embedded mortgages in a continuous-time environment).

[81] Similarly, consumers who expect to pay their loans over a period sufficiently short as to make the purchase of discount loans unattractive may find it better at the end of this expected period to continue to pay their mortgage and, consequently, suffer an unanticipated loss from refraining from the purchase of points. Yan Chang & Abdullah Yavas, *Do Borrowers Make Rational Choices on Points and Refinancing?,* 37 Real Estate Economics 635 (2009) (offering empirical evidence that consumers in their sample data remain in their current fixed-rate mortgages for too short a time to recover their initial investment in discount points). Other empirical evidence, however, conflicts with these results in regard to both the frequency and magnitude of losses. Simple numerical calculations that take into account taxes, local volatility in property values, and returns on alternative assets highlight the difficulty in drawing conclusions from much of the empirical data.

[82] In situations where consumers are unaware of their own circumstance or their own relative financial acuity, some creditors may be able to benefit. For example, an unethical creditor may persuade those consumers unaware of their lower relative financial ability to make incorrect decisions regarding purchasing points. The outcome of this type of adverse selection will, of course, be reversed when consumers have a more accurate knowledge of their financial abilities than does the creditor.

[83] Conversely, the elimination of the option to pay upfront points and fees could, depending on the extant risk in creditors' portfolios and their perceptions of differential risk between neighborhoods, seriously reduce the access to mortgage credit for some portion of consumers.

[84] In certain economic models, increased choice may not lead to improvements in consumer welfare.

Potential Benefits and Costs to Covered Persons

The ability to charge discount points and origination points or fees is a substantial benefit to loan originators and remains so even under the Bureau's requirement that, as a prerequisite for any such charge, creditors make available a comparable, alternative loan that does not include discount points and origination points or fees (except where the consumer is unlikely to qualify for the loan).[85] Based on the assumption that the costs of originating a comparable, alternative loan that does not include discount points and origination points or fees are sufficiently small (relative to the revenue from all mortgage funding), the proposed rule would create three significant benefits for creditors.

First, the conditional permission to charge discount points and origination points or fees allows creditors to increase their returns on mortgage funding by offering different loan terms to consumers having different preferences and posing different risks.

Second, creditors have the option to share risk with consumers. As noted above, discount points are one way for creditors to recoup some portion of the implicit value of the prepayment option from consumers and the primary means by which a creditor can hedge losses from potential consumer prepayment. The proposed rule's allowance of the payment of points in circumstances other than the limited circumstances permitted under the Dodd-Frank Act preserves the ability of creditors to share a loan's prepayment risk, created by the prepayment option embedded in the loan, with consumers. Regardless of whether discount points are actually exchanged in any particular mortgage transaction, the ability to offer such points to consumers is a valuable option to the creditor.[86]

A third benefit for creditors arises since adverse selection exists in the mortgage market, which compounds the risks borne from early repayment. Allowing consumers to purchase discount points, at least in part, allows them to signal to the creditor that they expect to make payments on their loan for a longer period than other consumers who choose not to purchase such points. Creditors gain from that information and will respond to such differences in behavior.[87] Increasing a creditor's ability to measure more finely the prepayment risk posed by an individual consumer allows him or her to more finely ''risk-price'' loans across consumers posing different risk. By charging different loan rates to consumers who pose different degrees of risk, the creditor will earn a greater overall return from funding mortgage loans.[88]

Both creditors, and by the preceding analysis, consumers benefit from the role of discount points as a credible signal and, consequently, the economic efficiency of the mortgage markets is enhanced.[89] The Bureau believes that this private means for reducing the risk that the mortgage loan (a liability for the consumer) can pose to the assets of the creditor is a significant source of efficiency in the mortgage market. In addition, mindful of the state of the United States housing and mortgage markets, the proposed rule also lowers the chances of any potential disruptions to those markets that might arise from implementing the Dodd-Frank Act provisions without change, which would be significantly different than current regulations. This should help promote the recovery and stability of those markets.

b. Requirement That All Creditors Make Available a Comparable, Alternative Loan

The Bureau is proposing to require that before a creditor or loan originator organization may impose discount points and origination points or fees on a consumer where someone other than the consumer pays a loan originator transaction-specific compensation, the creditor must make available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.)

In transactions that do not involve a mortgage broker, the proposed rule would provide a safe harbor if, any time prior to application that the creditor provides a consumer an individualized quote for a loan that includes discount points and origination points or fees, the creditor also provides a quote for a comparable, alternative loan that does not include such points or fees. In transactions that involve mortgage brokers, the proposed rule would provide a safe harbor under which creditors provide mortgage brokers with the pricing for all of their comparable, alternative loans that do not include discount points and origination points or fees. Mortgage brokers then would provide quotes to consumers for the loans that do not include discount points and origination points or fees when presenting different loan options to consumers.

Relative to the post-statute baseline, this provision on its own has no or very limited effect on the market. As described, in the absence of the proposed rule, virtually the only mortgage transactions allowed would be loans without any upfront discount points, or origination points and fees; under the proposed rule, creditors are required in most instances to make these loans available. Any differences that arise in prices, quantities or product mix available in the market that are attributable to changes in the legal environment, therefore arise from the exemption allowing discount points, and origination points and fees, rather than from this requirement.

Nevertheless, the Bureau has chosen to discuss the benefits, costs and impacts from mandating that creditors make available the comparable, alternative loan (except where a consumer is unlikely to qualify for such a loan). With the Bureau's exemption authority, one alternative could be to completely eliminate the Dodd-Frank Act's prohibitions and allow the payment of upfront points and fees with no restrictions. (The Bureau has chosen not to present that alternative.) The following analysis discusses the benefits, costs and impacts of the current proposed rule relative to the alternative (which would mirror the status quo) where no such requirement for a comparable, alternative loan would be in place.

[85] Since the Bureau's proposed provisions on both loan originator compensation and the conditional ability to charge upfront points and fees should, if adopted, effectively eliminate a loan originator's ability to engage in steering or similar practices possible under moral hazard, the analysis here will focus on only those benefits and costs which are unrelated to moral hazard.

[86] In contrast, the prohibition on payment of upfront points and fees in the Dodd-Frank Act under most circumstances would ensure that the value of the option to share risk through discount points is lost to both the creditor and the consumer in those circumstances.

[87] Credible signaling in such a situation, from the creditor's perspective, distinguishes two groups of consumers— one with low prepayment risk who purchase discount points, and the second a group not purchasing discount points and, consequently, expect to prepay their loan more rapidly than average—in what would otherwise be a pool of consumers who are perceived by the creditor to exhibit an equivalent measure of prepayment risk.

[88] In this situation where the efficiency of the market is only impaired by adverse selection, this increase in creditor returns is independent of whether the creditor sells loans in the secondary market or chooses to engage in hedging to hold these mortgages in portfolio.

[89] Conversely, the elimination of the payment of upfront points and fees to the extent provided in the Dodd-Frank Act could, depending on the extant risk in creditors' portfolios and various characteristics of property by neighborhood, seriously reduce the access to mortgage credit for some portion of consumers.

Potential Benefits and Costs to Consumers

Eliminating the prohibition on upfront points and fees creates greater choice for consumers over the means by which the consumer may compensate the creditor in exchange for the prepayment option in the mortgage. The preceding analysis discussed that greater choice should, under normal circumstances, create an *ex ante* welfare gain for consumers. The *ex post* (or realized) gains to consumers, however, may or may not exceed the corresponding frequency of realized losses.

Consumer choice is further expanded by the requirement that a creditor or loan originator organization generally make available the comparable, alternative loan to a consumer as a prerequisite to the creditor or loan originator organization imposing discount points and origination points or fees on the consumer in a transaction. In particular, the ability to choose this loan may be of particular benefit to those consumers having a relatively lower ability to accurately interpret loan terms. The simpler loan terms may help these consumers understand the total cost of the loan and select the mortgage most suited to them.[90]

Consumers may also benefit from the proposed rule if the greater prevalence of comparable, alternative loans and their rates makes terms of mortgage loans clearer and more observable for all mortgage products. A creditor's communication regarding its rate on a particular comparable, alternative loan may act as a benchmark or ''focal point'' for the purpose of comparing rates on all additional mortgage products available from this creditor. Such a focal point may anchor the consumer's assessment of the relative costs of each type of mortgage product available from that creditor. The comparable, alternative loan, as a result, conveys to consumers information about the value of discount points and origination points or fees on all other products offered by a given creditor and, under certain circumstances, across all creditors.[91] The availability of this benchmark, consequently, enhances the ability of all consumers, and particularly those having a relatively low degree of financial sophistication, to more accurately compare the terms of alternative mortgage products offered by a creditor and select that product that best suits the consumer's needs.

The magnitude of the benefits to consumers from having the rate on comparable, alternative loans available as a benchmark would depend, in part, on the volume of transactions in such mortgages.[92] A higher volume of transactions reduces the likelihood that the rate posted by any individual creditor reflects idiosyncrasies specific to that creditor. By reducing the expected deviation of the rate posted by a given creditor from the average rate posted by all creditors, a higher transaction volume results in an improvement in the accuracy with which a consumer can compare the rates on all loans offered by a given creditor. A lower volume, conversely, decreases such accuracy.

The Bureau believes that transactions without discount points and origination points or fees will be at a sufficiently high level to make the information conveyed by its average rate of significant value to consumers. This belief is founded on two factors. First, loans that do not include discount points and origination points or fees are currently offered and transacted in volumes comparable to several other types of mortgage loans. Second, the Bureau's proposed rule would give consumers certainty that this mortgage is generally available from virtually any creditor. Since current transactions volumes in this mortgage are comparable to those of many other mortgage products, this certainty about its universal availability, combined with its simplicity, should cause a level of consumer demand for the comparable, alternative mortgage sufficiently high to ensure sufficient transaction volumes.

Providing a useful means by which to compare rates also provides a potentially significant additional benefit to consumers.[93] Widespread availability of the current rate on the comparable, alternative loan should also lower the costs of comparing the rate on any mortgage product across creditors, owing to the correlation of costs and hence of rates among creditors. If so, this would encourage additional shopping by consumers. Additional shopping by consumers over alternative creditors would, in turn, enhance the degree of competition among creditors, further driving down prices and increasing consumer welfare.[94]

Potential Benefits and Costs to Covered Persons

Under the proposal, a creditor generally must make available a comparable, alternative loan to a consumer as a prerequisite to the creditor or loan originator organization imposing any discount points and origination points or fees on the consumer in a transaction (unless the consumer is unlikely to qualify for the comparable, alternative loan.) The proposed requirement would, in theory, have the potential to impose finance-related costs on creditors, particularly those whose size may preclude them from accessing either the secondary mortgage market or hedging (derivatives) markets.[95] Selling loans into the secondary market or investing in certain derivatives allows firms to lower the risk of their portfolios. Large and mid-sized creditors are able profitably to engage in these activities. In particular, the large number of fixed-income securities and hedging instruments available to these creditors should allow them to mitigate their financial risks.

The Bureau has considered whether future economic conditions could conceivably occur in which secondary market investors have no or low demand for comparable, alternative loans, rendering these products illiquid. In these circumstances, the volume of originations of such mortgages would drastically decrease with a concurrent rise in rates on the comparable, alternative loans, and a potential for increased exposure to credit and prepayment risk borne by creditors with limited asset diversification. Illiquidity in financial markets as a whole could inflict severe effects on creditors with portfolios consisting primarily of comparable, alternative loans. However, several factors mitigate the likelihood of

[90] Susan Woodward and Robert Hall (2012), Diagnosing Consumer Confusion and Sub-Optimal Shopping Effort: Theory and Mortgage-Market Evidence, forthcoming American Economic Review: Papers and Proceedings (documenting the existence of such consumers in domestic mortgage markets).

[91] The Bureau recognizes that rates on loans that do not include discount points and or origination points or fees may still not be perfectly comparable given that different creditors may have different additional charges. However, the rates on comparable, alternative loans should be correlated among creditors and informative.

[92] Higher transactions volumes in any product increase the accuracy and value of the information provided by its market price.

[93] When a distribution of financial acuity and abilities exists among consumers market transparency may exacerbate any existing cross-subsidization between consumers. As a result, it is possible that some consumers gain more relative to others.

[94] Under certain plausible circumstances, such additional shopping would also encourage entry by creditors into previously localized mortgage markets.

[95] The potential for these additional finance-related costs would likely be greater under the alternative discussed in part V. Under that alternative, some creditors will lose additional profits derived from loans they can no longer make because the consumer does not qualify for the comparable, alternative loan. Creditors in general will need to take the time to ensure that they make the comparable, alternative loan available, that they provide quotes for it where applicable, and that they assess the consumer's qualification for it.

this event. Most historical experience, along with the size, liquidity, and pace of innovation in the United States mortgage markets, make such an event unlikely. For example, some of the earliest secondary market innovations involved structuring mortgage securities with different tranches of prepayment risk.[96] These securities would offer investors the opportunity to voluntarily purchase alternative exposures to the prepayment risk arising from any underlying pool of mortgages.

Another potential concern of creditors, closely related to the issues of liquidity discussed above, is the possibility that the rates on comparable, alternative loans could reach certain discrete thresholds such as the cutoff for higher-rate mortgages or the threshold rate that triggers HOEPA coverage. In such cases, creditors may face a limited ability to sell these loans. To the extent that creditors hold these new loans in portfolio, they will face some additional risk.[97] Here too, considerations of several important features of the credit markets mitigate concerns for those creditors who could be adversely affected in these cases. First, creditors should be able to price comparable, alternative loans at values that maintain their compliance with regulations but allow them to attain a desired degree of aggregate risk in their portfolios of assets. Second, the volume of originations at such high rates would inevitably decline under all situations except that of a completely inelastic demand by consumers. Since each loan with discount points or origination points or fees is a substitute for the comparable, alternative loan, a sufficiently high relative price on the comparable, alternative loan will make them unattractive to most consumers.

In considering the benefits, costs, and impacts, the Bureau notes that neither the alternative of allowing points and fees without restriction nor the elimination of all points and fees would on balance provide benefits to all consumers as a group. As a consequence, any conclusion about the comparative benefits and costs to consumers must be based on a comparison of two mutually exclusive classes of consumers: (1) Those who benefit more from the adoption of an unrestricted points and fees proposal, relative to the prohibition of all points and fees; and (2) those who benefit more from the elimination of all points and fees offers. Both groups should benefit from the current proposed rule where a creditor who wishes to make available to a consumer a menu of loans with terms including points and/or fees generally must also make available to this consumer the comparable, alternative loan that does not include discount points and origination points or fees. The costs of the proposed rule should be minimal assuming the likely scenario that a sufficiently efficient market for comparable, alternative loans (in the presence of other types of mortgage products) would exist and that the potential costs of making available the comparable, alternative loan is not be too high for a significant proportion of creditors.

2. Compensation Based on Transaction Terms

Compensation rules, which restrict the means by which a loan originator receives compensation, are a practical way to mitigate potential harm to consumers arising from the opportunities for moral hazard on the part of loan originators.[98] Similar to the current regulation regarding loan originator compensation (*i.e.,* the Loan Originator Final Rule or, more simply, the ''current rule''), the Dodd-Frank Act mitigates consumer harm by targeting the means by which loan originators can unfairly increase remuneration for their services.

The Dodd-Frank Act generally mirrors the current rule's general prohibition on compensating an individual loan originator based on the terms of a ''transaction.'' Although the statute and the current rule are clear that an individual loan originator cannot be compensated differently based on the terms of his or her transactions, they do not expressly address whether the individual loan originator may be compensated based on the terms of multiple transactions, taken in the aggregate, of multiple loan originators employed by the same creditor or loan originator organization.

Through its outreach and the inquiries the Board and the Bureau have received about the application of the current regulation to qualified and non-qualified plans,[99] the Bureau believes that confusion exists about the application of the current regulation to compensation in the form of bonuses paid under profit-sharing plans (which under the proposed commentary is deemed to include so called ''bonus pools'' and ''profit pools'') and employer contributions to qualified and non-qualified defined benefit and contribution plans. As discussed in the section-by-section analysis, these types of compensation are often indirectly based on the aggregate transaction terms of multiple individual loan originators employed by the same creditor or loan originator organization, because aggregate transaction terms (*e.g.,* the average interest rate spread of the individual loan originators' transactions in a particular calendar year over the creditor's minimum acceptable rate) affects revenues, which in turn affects profits, and which, in turn, influences compensation decisions where profits are taken into account.

The proposed rule and commentary would address this confusion by clarifying the scope of the compensation restrictions in current § 1026.36(d)(1)(i). In so clarifying the compensation restrictions, the proposed rule treats different types of compensation structures differently based on an analysis of the potential steering incentives created by the particular structure. The proposed rule would permit employers to make contributions to qualified plans (which, as explained in the proposed commentary, include defined benefit and contribution plans that satisfy the qualification requirements of IRC section 401(a) or certain other IRC sections), even if the contributions were made out of mortgage business profits. The proposed rule also would permit bonuses under non-qualified profit-sharing plans, profit pools, and bonus pools and employer contributions to non-qualified defined benefit and contribution plans if: (1) The mortgage business revenue component of the total revenues of the company or business unit to which the profit-sharing plan applies, as applicable, is below a certain threshold, even if the payments or contributions were made out of mortgage business profits (the Bureau is proposing

[96] Some of the earliest securitizations were so called Collateralized Mortgage Obligations created by Freddie Mac in the late 1980s. See Brochure, Freddie Mac, *Direct Access Retail Remic Tranches* (2008), available at: *http://www.freddiemac.com/mbs/docs/freddiedarts_brochure.pdf*; Frank Fabozzi, Chuck Ramsey, and Frank Ramirez, Collateralized Mortgage Obligations: Structures and Analysis (Frank J Fabozzi Assocs., 1994).

[97]

[98] Moral hazard, in the current context of mortgage origination, depends fundamentally on the advantage the loan originator has in knowing the least expensive loan terms acceptable to creditors and greater overall knowledge of the functioning of mortgage markets. Holden Lewis, *''Moral Hazard'' Helps Shape Mortgage Mess,* Bankrate (Apr. 18, 2007), available at: *http://www.bankrate.com/brm/news/mortgages/20070418_subprime_mortgage_morality_a1.asp* (providing a practitioner description of the costs of such moral hazard on the current mortgage and housing industries).

[99] As noted in the section-by-section analysis, the Bureau issued CFPB Bulletin 2012–2 in response to the questions it received regarding the applicability of the current regulation to qualified plans and non-qualified plans, and this regulation is intended in part to provide further clarity on such issues.

alternative threshold amounts of 50 and 25 percent); or (2) the individual loan originator has been the loan originator for five or fewer transactions during the preceding 12-month period, *i.e.,* a ''de minimis'' test for individuals who originate a very small number of transactions per year. The proposed rule, however, would reaffirm the current rule and not permit individual loan originators to be compensated based on the terms of their individual transactions.

Compensation in the form of bonuses paid under profit-sharing plans and employer contributions to qualified and non-qualified defined benefit and contribution plans is normally based on the profitability of the firm.[100] As with compensation paid to the individual loan originator concurrently with loan origination, compensation paid pursuant to a profit-sharing plan is designed to provide individual loan originators and other employees with greater performance incentives and to align their interests with those of the owners of the institution employing them.[101] When moral hazard exists, however, such profit-sharing could lead to misaligned incentives on the part of individual loan originators with respect to consumers. The magnitude of adverse incentives arising from profit-sharing in creating gains to the owners of the loan originator organization or creditor, however, depends on several circumstances.[102] These include the number of individual loan originators employed by the creditor or loan originator organization that contributes to the funds available for profit-sharing, the means by which shares of the profits are distributed to the individual loan originators in the same firm, and the ability of owners to monitor loan quality on an ongoing basis.

Potential Benefits and Costs to Covered Persons

As described above, considering the benefits, costs and impacts of this provision requires the understanding of current industry practice against which to measure any changes. As discussed, the Bureau believes, based on outreach to and inquiries received from industry, that confusion exists about the application of the current regulation to compensation in the form of bonuses paid under profit-sharing plans, bonus pools, and employer contributions to qualified and non-qualified plans. In light of this confusion, the Bureau believes that industry practice likely varies and therefore any determination of the costs and benefit of the proposed rule depend critically on assumptions about current firm practices.

Firms that currently offer incentive-based compensation arrangements for individual loan originators that would continue to be allowed under the proposed rule should incur neither costs nor benefits from the proposed rule. Notably, the proposed rule would clarify that employer contributions to qualified plans in which individual loan originators participate are permitted under the current rule.[103] Such firms can continue to benefit from these arrangements, which have the potential to motivate individual productivity; to reduce potential intra-firm moral hazard by aligning the interests of individual originators with those of their employer; and to reduce the potential for increased costs arising from adverse selection in the retention of more productive employees. Firms that do not offer such plans would benefit, with the increased clarity of the proposed rule, from the opportunity to do so should they so choose.[104]

Firms that did not change their compensation practices in response to the current rule and that currently offer compensation arrangements that would be prohibited under the proposed rule would incur costs. These include costs from changing internal accounting practices, re-negotiating the remuneration terms in the contracts of existing employees and any other industry practice related to these methods of compensation. For these firms, the prohibition on compensation based on transaction terms may contribute to adverse selection among individual loan originators, a possible lower average quality of individual loan originators in such a firm, higher retention costs, and possibly lower profits.[105] The specific numerical threshold also implies that some loan originators may now suffer the disadvantage of facing competitors with fewer restrictions on compensation. These potential differential effects may be greater for small creditors and loan originator organizations, and loan originator organizations that originate loans as their exclusive, or primary, line of business. The Bureau seeks comments and data on the current compensation practices of those firms at or above the thresholds.

Potential Benefits and Costs to Consumers

The proposed rule would benefit most consumers by clarifying the current regulation to address, and mitigate, the steering incentives inherent in the nature of profit-sharing plans and other types of compensation that are directly or indirectly based on the terms of multiple transactions of multiple individual loan originators. Limiting such incentive-based compensation for many firms limits the potential for steering consumers into more expensive loans. The Bureau's approach permits bonuses under profit-sharing plans, contributions to qualified plans, and contributions to non-qualified plans only where the steering incentives are sufficiently attenuated (*i.e.,* the nexus between the transaction terms and the compensation is too indirect).

3. Qualification Requirements for Loan Originators

Section 1402 of Dodd-Frank amends TILA to impose a duty on loan originators to be ''qualified'' and, where applicable, registered or licensed as a loan originator under State law and the Federal SAFE Act. Employees of depositories, certain of their subsidiaries, and nonprofit organizations currently do not have to meet the SAFE Act standards that apply to licensing, such as taking pre-licensure classes, passing a test, meeting

[100] Payments to qualified retirement plans include, for example, employer contributions to employee 401(k) plans.

[101] Bengt Holmstrom, *Moral Hazard and Observability,* 10 Bell Journal of Economics 74 (1979) (providing the first careful analysis of the effects such compensation methods have on employee incentives).

[102] For example, when the compensation to each loan originator depends upon on the aggregate efforts of multiple originators (rather than directly on the individual loan originator's own performance) then that individual's efforts have increasingly little influence on the compensation the individual receives through a profit-sharing plan. As a result, each individual reduces his or her effort. This ''free-riding'' behavior has been extensively analyzed: Surveys of these analyses appear in Martin L. Weitzman, *Incentive Effects of Profit Sharing, in Trends in Business Organization: Do Participation and Cooperation Increase Competitiveness?* (Kiel Inst. of World Econs.1995), available at: *http://ws1.ad.economics.harvard.edu/faculty/weitzman/files/IncentiveEffectsProfitSharing.pdf.*

[103] As noted earlier, the Bureau issued CFPB Bulletin 2012–2, which stated that the practice is permitted under the current rule, but the bulletin was issued as guidance pending the adoption of final rules on loan originator compensation.

[104] Some firms may choose not to offer such compensation. In certain circumstances an originating institution (perhaps unable to invest in sufficient management expertise) will see reduced profitability from adopting incentive -based compensation.

[105] Analysis of Call Report data from depository institutions and credit unions indicates that among depository institutions, roughly 6 percent are likely to exceed the 50 percent threshold and 30 percent are likely to exceed the 25 percent threshold. The largest impact would be on thrifts, whose business model historically has centered on residential mortgage lending.

character and fitness standards, having no felony convictions within the previous seven years, or taking annual continuing education classes. To implement the Dodd-Frank-Act's requirement that entities employing or retaining the services of individual loan originators be ''qualified,'' the proposed rule would require entities whose individual loan originators are not subject to SAFE Act licensing, including depositories and bona fide nonprofit loan originator entities, to: (1) Ensure that their individual loan originators meet character and fitness and criminal background standards equivalent to the licensing standards that the SAFE Act applies to employees of non-bank loan originators; and (2) provide appropriate training to their individual loan originators commensurate with the mortgage origination activities of the individual. The proposed rule would mandate training appropriate for the actual lending activities of the individual loan originator and would not impose a minimum number of training hours. In developing this provision, the Bureau used its discretion. As such, the benefits and costs of this provision are discussed relative to a pre-statute baseline.[106]

Potential Benefits and Costs to Consumers

Consumers will inevitably make subjective evaluations of the expertise of any loan originators with whom they consult. A consumer's knowledge that all originators possess a minimal level of such expertise would be of significant assistance to the accuracy of that evaluation and to the consumer's confidence in the originator with whom they initially begin negotiations. Consumers, who are generally considered to prefer certainty, will benefit to the extent that the current provisions increase such consumer confidence. Consumers incur no new direct costs created by the current proposal; any increases that originators may pass on to consumers will be de minimis.

Potential Benefits and Costs to Covered Persons

The increased requirements for institutions that employ individuals not licensed under the SAFE Act would further assure that the individual loan originators in their employ satisfy those levels of expertise and standards of probity as specified in the current proposed rule.[107] This would have a positive effect by tending to reduce any potential liability they incur in future mortgage transactions and to enhance their reputation among consumers. An increase in consumer confidence in the expertise and experience of loan originators may possibly increase the number of consumers willing to engage in these transactions.

In addition, relative to current market conditions, the proposed rule would create a more level ''playing field'' between non-banking institutions and depository and non-profit institutions with regard to the enhanced training requirements and background checks that would be required of the latter institutions. This may help mitigate any possible adverse selection in the market for individual originators, in which non-banking institutions employ and retain only the most qualified individuals while those of more modest expertise seek employment by depository and non-profit institutions.

For depository institutions, the enhanced requirements related to findings from a criminal background check may cause certain loan originators to no longer be able to work at these institutions. It also slightly limits the pool of employees from which to hire, relative to the pool from which they can hire under existing requirements. Following an initial transition period where firms will have to perform the background check on current employees, these costs should be minimal. Similarly, the additional credit check for current loan originators at depository institutions, and the ongoing requirement will result in some minimal increased costs. Non-banking institutions not currently subject to the SAFE Act will have to incur the costs of both the criminal background check and the credit check.

4. Potential Benefits and Costs From Other Provisions

Mandatory Arbitration: Section 1414 of the Dodd-Frank Act added section 129C(e) to TILA. Section 129C(e) prohibits terms in any residential mortgage loan (as defined in the Dodd-Frank Act) or related agreement from requiring arbitration or any other non-judicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction. The proposed rule implements this statutory provision of the Dodd-Frank Act. Relative to a pre-statute baseline, mortgage-related agreements can no longer reflect such terms. Consumers who desire access to the judicial system over disputes will not be prohibited from having such access. Some creditors and other parties will have to incur any additional costs of such legal actions above the costs associated with arbitration. Based on its outreach, the Bureau believes that to the extent terms that would be prohibited are currently included in any transactions covered by the statute, they are most likely to be included in contracts for open-ended mortgage credit. The Bureau requests comment on the prevalence of contracts with such terms for the purposes of the analysis under Section 1022 of the Dodd-Frank Act.

Creditor Financing of ''Single Premium'' Credit Insurance: Dodd-Frank Act section 1414 added section 129C(f) to TILA. Section 129(C)(f) pertains to a creditor financing credit insurance fees for the consumer. Although the provision permits insurance premiums to be calculated and paid in full per month, this provision prohibits a creditor from financing any fees, including premiums, for credit insurance in closed- and certain open-end loan transactions secured by a dwelling. The proposed rule implements the relevant statutory provision of the Dodd-Frank Act. The structure of these transactions is often harmful to consumers, and as such the proposed rule should benefit consumers.

5. Additional Potential Benefits and Costs

Covered persons would have to incur some costs in reviewing the proposed rule and adapting their business practices to any new requirements. The Bureau notes that many of the provisions of the current rule do not require significant changes to current practice and therefore these costs should be minimal for most covered persons.

The Bureau has considered whether the proposed rule would lead to a potential reduction in access to consumer financial products and services. The Bureau notes that many of the provisions of the current rule do not require significant changes to current consumer financial products or providers' practices. Firms will not have to incur substantial operational costs. As result, the Bureau does not anticipate any material impact on consumer access to mortgage credit.

[106] Use of the post-statute baseline used earlier in this analysis would be uninformative since even post statute but in the absence of the proposal, the definition of ''qualified'' would still be unclear.

[107] Under Regulation G, depository institutions must already obtain criminal background checks for their individual loan originator employees and review them for compliance under Section 19 of the FDIA.

E. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026 [108]

Overall, the impact on smaller creditors of the Bureau's proposed rule would depend on several factors, the most important of which involve: (1) The ability of such creditors to manage any additional risk or loss of return the requirement generally to make available a comparable, alternative loan potentially imposes on the overall risk and return of their current portfolios; (2) the effects of the requirements on their return to equity and capital costs relative to larger competitors; and (3) their ability to recover, in a timely matter, any costs of processing loans. As previously discussed, the additional risk to the portfolios of any but the smallest creditors, from the requirement to make available the comparable, alternative loan (unless the consumer is unlikely to qualify), is likely to be small for the same reasons that apply to the portfolio risk of larger institutions and other investors.

Certain circumstances could, however, create a greater potential for adverse effects on small creditors, relative to their larger rivals, from originating large volumes of comparable, alternative loans. These circumstances occur if the financial capacity of the small creditor affects both its cost of raising capital and its ability to hedge risk. Should such an institution be unable effectively to hedge prepayment and credit risk with larger rivals or through the markets (*e.g.,* the firm has substantial fixed costs of accessing the secondary market), then the general requirement to make available a comparable, alternative loan in specified circumstances could cause it greater costs, relative to its size, than those that larger institutions would incur.

Under the proposed rule, smaller creditors may originate and hold more loans that do not include discount points and origination points or fees. These creditors may have fewer funds available from origination revenues to fund loan origination operations and, if they are unable to easily borrow, the general requirement to make available the comparable, alternative loan may result in greater costs. In all the cases described, however, these costs would necessarily be considerably smaller than those that they would suffer, for similar reasons, under the Dodd-Frank Act prohibition against the origination of mortgages with upfront discount points and origination points or fees under most circumstances.

2. Impact on Consumers in Rural Areas

Consumers in rural areas are unlikely to experience benefits or costs from the proposed rule that are different from those benefits and costs experienced by consumers in general. Consumers in rural areas who obtain mortgage loans from mid-size to large creditors would experience virtually the same costs and benefits as do any others who use such creditors. Those consumers in rural areas who obtain mortgages from small local banks and credit unions may face slightly different benefit and costs. As noted above, the provisions of the proposed rule conditionally allowing upfront points and fees may expose some consumers to the risk that a more informed creditor will use these terms to its advantage. This may be less likely to occur in cases of smaller, more local creditors.

To the extent that the requirement that a creditor generally must make available a make available comparable, alternative loans as a prerequisite to the creditor or loan originator organization imposing discount points and origination points or fees on consumers would raise the cost of credit, these impacts are most likely at smaller creditors. Rural consumers using such creditors may face these marginally increased costs. However, these effects would derive from the provisions of the Dodd-Frank Act if they were permitted to go into effect; if anything, the proposed rule would alleviate burden from small creditors by permitting them to make available loans with discount points and origination points or fees, subject to certain conditions.

F. Additional Analysis Being Considered and Request for Information

The Bureau will further consider the benefits, costs and impacts of the proposed provisions and additional alternatives before finalizing the proposed rule. As noted above, there are a number of areas where additional information would allow the Bureau to better estimate the benefits, costs, and impacts of this proposed rule and more fully inform the rulemaking. The Bureau asks interested parties to provide comment or data on various aspects of the proposed rule, as detailed in the section-by-section analysis. The most significant of these include information or data addressing:

- The potential impact on all types of loan originators of the proposed restrictions on the methods by which a loan originator is remunerated in a transaction;
- The potential impact on mortgage lenders, including depository and non-depository institutions, of the requirement that all creditors must make available a comparable, alternative mortgage loan to a consumer that does not include discount points and origination points and fees, unless the consumer is unlikely to qualify for such a loan.

Information provided by interested parties regarding these and other aspects of the proposed rule may be considered in the analysis of the costs and benefits of the final rule.

To supplement the information discussed in in this preamble and any information that the Bureau may receive from commenters, the Bureau is currently working to gather additional data that may be relevant to this and other mortgage related rulemakings. These data may include additional data from the NMLSR and the NMLSR Mortgage Call Report, loan file extracts from various creditors, and data from the pilot phases of the National Mortgage Database. The Bureau expects that each of these datasets will be confidential. This section now describes each dataset in turn.

First, as the sole system supporting licensure/registration of mortgage companies for 53 agencies for States and territories and mortgage loan originators under the SAFE Act, NMLSR contains basic identifying information for non-depository mortgage loan origination companies. Firms that hold a State license or registration through NMLSR are required to complete either a standard or expanded Mortgage Call Report (MCR). The Standard MCR includes data on each firm's residential mortgage loan activity including applications, closed loans, individual mortgage loan originator activity, line of credit, and other data repurchase information by state. It also includes financial information at the company level. The expanded report collects more detailed information in each of these areas for those firms that sell to Fannie Mae or Freddie Mac.[109] To date, the Bureau has received basic data on the firms in the NMLSR and de-identified data and tabulations of data from the NMLSR Mortgage Call Report. These data were used, along with data

[108] Approximately 50 banks with under $10 billion in assets are affiliates of large banks with over $10 billion in assets and subject to Bureau supervisory authority under Section 1025. However, these banks are included in this discussion for convenience.

[109] More information about Mortgage Call Report can be found at: *http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx.*

from HMDA, to help estimate the number and characteristics of non-depository institutions active in various mortgage activities. In the near future, the Bureau may receive additional data on loan activity and financial information from the NMLSR including loan activity and financial information for identified creditors. The Bureau anticipates that these data will provide additional information about the number, size, type, and level of activity for non-depository creditors engaging in various mortgage origination activities. As such, it supplements the Bureau's current data for non-depository institutions reported in HMDA and the data already received from NMLSR. For example, these new data will include information about the number and size of closed-end first and second loans originated, fees earned from origination activity, levels of servicing, revenue estimates for each firm and other information. The Bureau may compile some simple counts and tabulations and conduct some basic statistical modeling to better model the levels of various activities at various types of firms. In particular, the information from the NMLSR and the MCR may help the Bureau refine its estimates of benefits, costs, and impacts for updates to loan originator compensation rules, revisions to the GFE and HUD–1 disclosure forms, changes to the HOEPA thresholds, changes to requirements for appraisals, and proposed new servicing requirements and the new ability to pay standards.

Second, the Bureau is working to obtain a random selection of loan-level data from a handful of creditors. The Bureau intends to request loan file data from creditors of various sizes and geographic locations to construct a representative dataset. In particular, the Bureau will request a random sample of ''GFEs'' and ''HUD–1'' forms from loan files for closed-end mortgage loans. These forms include data on some or all loan characteristics including settlement charges, origination charges, appraisal fees, flood certifications, mortgage insurance premiums, homeowner's insurance, title charges, balloon payment, prepayment penalties, origination charges, and credit charges or points. Through conversations with industry, the Bureau believes that such loan files exist in standard electronic formats allowing for the creation of a representative sample for analysis.

Third, the Bureau may also use data from the pilot phases of the National Mortgage Database (NMDB) to refine its proposals and/or its assessments of the benefits costs and impacts of these proposals. The NMDB is a comprehensive database, currently under development, of loan-level information on first lien single-family mortgages. It is designed to be a nationally representative sample (one percent) and contains data derived from credit reporting agency data and other administrative sources along with data from surveys of mortgage borrowers. The first two pilot phases, conducted over the past two years, vetted the data-development process, successfully pretested the survey component and produced a prototype dataset. The initial pilot phases validated that credit repository data are both accurate and comprehensive and that the survey component yields a representative sample and a sufficient response rate. A third pilot is currently being conducted with the survey being mailed to holders of five thousand newly originated mortgages sampled from the prototype NMDB. Based on the 2011 pilot, a response rate of 50 percent or higher is expected. These survey data will be combined with the credit repository information of non-respondents and then de-identified. Credit repository data will be used to minimize non-response bias, and attempts will be made to impute missing values. The data from the third pilot will not be made public. However, to the extent possible, the data may be analyzed to assist the Bureau in its regulatory activities and these analyses will be made publicly available.

The survey data from the pilots may be used by the Bureau to analyze borrowers' shopping behavior regarding mortgages. For instance, the Bureau may calculate the number of borrowers who use brokers, the number of lenders contacted by borrowers, how often and with what patterns potential borrowers switch lenders, and other behaviors. Questions may also assess borrowers' understanding of their loan terms and the various charges involved with origination. Tabulations of the survey data for various populations and simple regression techniques may be used to help the Bureau with its analysis.

In addition to the comment solicited elsewhere in this proposed rule, the Bureau requests commenters to submit data and to provide suggestions for additional data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also requests comment on the use of the data described above. Further, the Bureau seeks information or data on the proposed rule's potential impact on consumers in rural areas as compared to consumers in urban areas. The Bureau also seeks information or data on the potential impact of the proposed rule on depository institutions and credit unions with total assets of $10 billion or less as described in Dodd-Frank Act section 1026 as compared to depository institutions and credit unions with assets that exceed this threshold and their affiliates.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by SBREFA, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small not-for-profit organizations, and small governmental units. 5 U.S.C. 601 *et seq.* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. The Bureau is also subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives (SERs) prior to proposing a rule for which an IRFA is required. 5 U.S.C. 609.

The Bureau has not certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired a Small Business Review Panel to consider the impact of the proposed rule on small entities that would be subject to that rule and to obtain feedback from representatives of such small entities. The Small Business Review Panel for this rulemaking is discussed below in part VIII.A.

The Bureau is publishing an IRFA. Among other things, the IRFA estimates the number of small entities that will be subject to the proposed rule and describes the impact of that rule on those entities. The IRFA for this rulemaking is set forth below in part VIII.B.

A. Small Business Review Panel

Under section 609(b) of the RFA, as amended by SBREFA and the Dodd-Frank Act, the Bureau seeks, prior to conducting the IRFA, information from representatives of small entities that may potentially be affected by its proposed rules to assess the potential impacts of that rule on such small entities. 5 U.S.C. 609(b). Section 609(b) sets forth a series of procedural steps with regard to obtaining this information. The Bureau first notifies

the Chief Counsel for Advocacy (Chief Counsel) of the SBA and provides the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the types of small entities that might be affected. 5 U.S.C. 609(b)(1). Not later than 15 days after receipt of the formal notification and other information described in section 609(b)(1) of the RFA, the Chief Counsel then identifies the SERs, the individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule. 5 U.S.C. 609(b)(2). The Bureau convenes a review panel for such rule consisting wholly of full-time Federal employees of the office within the Bureau responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs (OIRA) within the OMB, and the Chief Counsel. 5 U.S.C. 609(b)(3). The Small Business Review Panel reviews any material the Bureau has prepared in connection with the Small Business Review Panel process and collects the advice and recommendations of each individual SER identified by the Bureau after consultation with the Chief Counsel on issues related to sections 603(b)(3) through (b)(5) and 603(c) of the RFA.[110] 5 U.S.C. 609(b)(4). Not later than 60 days after the date the Bureau convenes the Small Business Review Panel, the panel reports on the comments of the SERs and its findings as to the issues on which the Small Business Review Panel consulted with the SERs, and the report is made public as part of the rulemaking record. 5 U.S.C. 609(b)(5). Where appropriate, the Bureau modifies the rule or the IRFA in light of the foregoing process. 5 U.S.C. 609(b)(6).

In May 2012, the Bureau provided the Chief Counsel with the formal notification and other information required under section 609(b)(1) of the RFA. To obtain feedback from SERs to inform the Small Business Review Panel pursuant to sections 609(b)(2) and 609(b)(4) of the RFA, the Bureau, in consultation with the Chief Counsel, identified 6 categories of small entities that may be subject to the proposed rule for purposes of the IRFA: Commercial banks, savings institutions, credit unions, mortgage brokers, real estate credit entities (non-depository lenders), and certain non-profit organizations. Section 3 of the IRFA, in part VIII.B.3, below, describes in greater detail the Bureau's analysis of the number and types of entities that may be affected by the proposed rule. Having identified the categories of small entities that may be subject to the proposed rule for purposes of an IRFA, the Bureau then, in consultation with the Chief Counsel, selected 17 SERs to participate in the Small Business Review Panel process. As described in chapter 7 of the Small Business Review Panel Report, described below, the SERs selected by the Bureau in consultation with the Chief Counsel included representatives from each of the categories identified by the Bureau and comprised a diverse group of individuals with regard to geography and type of locality (*i.e.,* rural, urban, suburban, or metropolitan areas).

On May 9, 2012, the Bureau convened the Small Business Review Panel pursuant to section 609(b)(3) of the RFA. Afterwards, to collect the advice and recommendations of the SERs under section 609(b)(4) of the RFA, the Small Business Review Panel held an outreach meeting/teleconference with the SERs on May 23, 2012. To help the SERs prepare for the outreach meeting beforehand, the Small Business Review Panel circulated briefing materials prepared in connection with section 609(b)(4) of the RFA that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[111] All 17 SERs participated in the outreach meeting either in person or by telephone. The Bureau then held two teleconference calls with the SERs on June 7 and June 8, 2012, in which a potential provision under consideration requiring that origination fees in certain transactions not vary with the size of the loan was further discussed. At the request of several SERs and in light of the additional calls, the Small Business Review Panel extended the SERs deadline to submit written feedback, which was originally June 4, 2012, to June 11, 2012. The Small Business Review Panel received written feedback from 11 of the representatives.[112]

On July 11, 2012,[113] the Small Business Review Panel submitted to the Director of the Bureau, Richard Cordray, the Small Business Review Panel Report that includes the following: Background information on the proposals under consideration at the time: Information on the types of small entities that would be subject to those proposals and on the SERs who were selected to advise the Small Business Review Panel; a summary of the Small Business Review Panel's outreach to obtain the advice and recommendations of those SERs; a discussion of the comments and recommendations of the SERs; and a discussion of the Small Business Review Panel findings, focusing on the statutory elements required under section 603 of the RFA. 5 U.S.C. 609(b)(5).[114]

In preparing this proposed rule and the IRFA, the Bureau has carefully considered the feedback from the SERs participating in the Small Business Review Panel process and the findings and recommendations in the Small Business Review Panel Report. The section-by-section analysis of the proposed rule in part V, above, and the IRFA discuss this feedback and the specific findings and recommendations of the Small Business Review Panel, as applicable. The Small Business Review Panel process provided the Small Business Review Panel and the Bureau with an opportunity to identify and explore opportunities to minimize the burden of the rule on small entities while achieving the rule's purposes. It is important to note, however, that the Small Business Review Panel prepared the Small Business Review Panel Report at a preliminary stage of the proposal's development and that the Small Business Review Panel Report—in particular, the Small Business Review Panel's findings and recommendations—should be considered in that light. Also, any options identified in the Small Business Review Panel Report for reducing the

[110] As described in the IRFA in part VIII.B, below, sections 603(b)(3) through (b)(5) and section 603(c) of the RFA, respectively require a description of and, where feasible, provision of an estimate of the number of small entities to which the proposed rule will apply; a description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b)(3), 603(b)(4), 603(b)(5), 603(c).

[111] The Bureau posted these materials on its Web site and invited the public to email remarks on the materials. *See* U.S. Consumer Fin. Prot. Bureau, *Small Business Review Panel for Residential Mortgage Loan Origination Standards Rulemaking: Outline of Proposals Under Consideration and Alternative Considered* (May 9, 2012) (Outline of Proposals), available at: *http://files.consumerfinance.gov/f/201205_cfpb_MLO_SBREFA_Outline_of_Proposals.pdf.*

[112] This written feedback is attached as Appendix A to the Small Business Review Panel Final Report discussed below.

[113] The Panel extended its deliberations in order to allow full consideration and incorporation of the written comments of the SERs that were submitted pursuant to the extended deadline.

[114] Small Business Review Panel Final Report, *supra* note 36.

proposed rule's regulatory impact on small entities were expressly subject to further consideration, analysis, and data collection by the Bureau to ensure that the options identified were practicable, enforceable, and consistent with TILA, the Dodd-Frank Act, and their statutory purposes. The proposed rule and the IRFA reflect further consideration, analysis, and data collection by the Bureau.

B. Initial Regulatory Flexibility Analysis

Under RFA section 603(a), an IRFA ''shall describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Section 603(b) of the RFA sets forth the required elements of the IRFA. Section 603(b)(1) requires the IRFA to contain a description of the reasons why action by the agency is being considered. 5 U.S.C. 603(b)(1). Section 603(b)(2) requires a succinct statement of the objectives of, and the legal basis for, the proposed rule. 5 U.S.C. 603(b)(2). The IRFA further must contain a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply. 5 U.S.C. 603(b)(3). Section 603(b)(4) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record. 5 U.S.C. 603(b)(4). In addition, the Bureau must identify, to the extent practicable, all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule. 5 U.S.C. 603(b)(5). The Bureau, further, must describe any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b)(6). Finally, as amended by the Dodd-Frank Act, RFA section 603(d) requires that the IRFA include a description of any projected increase in the cost of credit for small entities, a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and that minimize any increase in the cost of credit for small entities (if such an increase in the cost of credit is projected), and a description of the advice and recommendations of representatives of small entities relating to the cost of credit issues. 5 U.S.C. 603(d)(1); Dodd-Frank Act section 1100G(d)(1).

1. Description of the Reasons Why Agency Action Is Being Considered

As discussed in the Background, part II above, in the wake of the financial crisis, the Board in 2010 issued the Loan Originator Final Rule, which has been transferred to the Bureau. The Loan Originator Final Rule addressed many concerns regarding the lack of transparency, consumer confusion, and steering incentives created by certain residential loan originator compensation structures. The Dodd-Frank Act included a number of provisions that substantially paralleled, but also added further provisions to, the Loan Originator Final Rule. The Board noted in adopting the Loan Originator Final Rule that the Dodd-Frank Act would necessitate further rulemaking to implement the additional provisions of the legislation not reflected by the regulation. These provisions are new TILA sections 129B(b)(1) (requiring each mortgage originator to be qualified and include unique identification numbers on loan documents), (c)(1) and (c)(2) (prohibiting steering incentives including prohibiting mortgage originators from receiving compensation that varies based on loan terms and from receiving origination charges or fees from persons other than the consumer except in certain circumstances), and 129C(d) and (e) (prohibiting financing of single-premium credit insurance and providing restrictions on mandatory arbitration agreements), as added by sections 1402, 1403, 1414(d) and (e) of the Dodd-Frank Act. The Bureau is also proposing to clarify certain provisions of the existing Loan Originator Final Rule to provide additional guidance and reduce uncertainty. The Bureau is also soliciting comment on implementing the requirement in TILA section 129B(b)(2), as added by section 1402 of the Dodd-Frank Act, that it prescribe regulations requiring certain entities to establish and maintain certain procedures, a requirement that may be included in the final rule.

The Dodd-Frank Act and TILA authorize the Bureau to adopt implementing regulations for the statutory provisions provided by sections 1402, 1403, and 1414(d) and (e) of the Dodd-Frank Act. The Bureau is using this authority to propose regulations in order to provide creditors and loan originators with clarity about their statutory obligations under these provisions. The Bureau is also proposing to adjust or provide exemptions to the statutory requirements, including the obligations of small entities, in certain circumstances. The Bureau is taking this action in order to ease burden when doing so would not sacrifice adequate protection of consumers.

The new statutory requirements relating to qualification and compensation take effect automatically on January 21, 2013, as written in the statute, unless final rules are issued on or prior to that date that provide for a later effective date.[115]

2. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objectives of this rulemaking are: (1) To revise current § 1026.36 and commentary to implement substantive requirements in new TILA sections 129B(b), (c)(1), and (c)(2) and 129C(d) and (e), as added by sections 1402, 1403, and 1414(d) and (e) of the Dodd-Frank Act; (2) to clarify ambiguities between current § 1026.36 and the new TILA amendments; (3) to adjust existing rules governing compensation to individual loan originators to account for Dodd-Frank Act amendments to TILA; and (4) to provide greater clarity, guidance, and flexibility on several issues.

To address consumer confusion over the relationship between certain upfront loan charges and loan interest rates, the proposal would require that, in certain circumstances, before the creditor or loan originator organization may impose upfront discount points, origination points, or originations fees on a consumer, the creditor must make available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees that are retained by the creditor, loan originator organization, or an affiliate of either. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.) The proposed use of the Bureau's exception authority under TILA section 129B(c)(2)(B)(ii) to allow creditors and loan originator organization to impose discount points and origination points or fees provided that the creditor makes available a comparable, alternative loan, as described above, will implement TILA section 129B(c)(2)(B) and make it easier for consumers to understand terms and evaluate pricing options while preserving their ability to make and receive the benefit of some upfront payments of points and fees. In addition to reducing consumer confusion, the proposal would also avoid a radical restructuring of existing mortgage market pricing structures that may

[115] *See* Small Business Review Panel Report for a detailed discussion of the issues related to the effective dates of the rules in this rulemaking.

result from strict implementation of the Dodd-Frank Act and thus would promote stability in the mortgage market.

The proposal would also implement certain other Dodd-Frank Act requirements applicable to both closed-end and open-end mortgage credit. Specifically, the proposed provisions would codify TILA section 129C(d), which creates prohibitions on financing of premiums for single-premium credit insurance. The proposed provisions would also implement TILA section 129C(e), which restricts agreements requiring consumers to submit any disputes that may arise to mandatory arbitration, thereby preserving consumers' ability to seek redress through the court system after a dispute arises. The proposal also solicits comment on implementing TILA section 129B(b)(2), which requires the Bureau to prescribe regulations requiring depository institutions to establish and monitor compliance of such depository institutions, the subsidiaries of such institutions, and the employees of both with the requirements of TILA section 129B and the registration procedures established under section 1507 of the SAFE Act.

In addition to creating new substantive requirements, the Dodd-Frank Act extended previous efforts by lawmakers and regulators to strengthen loan originator qualification requirements and regulate industry compensation practices. New TILA section 129B(b) imposes a duty on loan originators to be ''qualified'' and, where applicable, registered or licensed as a loan originator under State law and the Federal SAFE Act and to include unique identification numbers on loan documents. The proposal would implement this section and expand consumer protections by requiring entities whose individual loan originators are not subject to SAFE Act licensing requirements, including depositories and bona fide nonprofit loan originator entities, to: (1) Ensure that their individual loan originators meet character and fitness and criminal background standards equivalent to the licensing standards that the SAFE Act applies to employees of non-bank loan originators; and (2) provide appropriate training to their individual loan originators commensurate with the mortgage origination activities of the individual.

Furthermore, the proposal would adjust existing rules governing compensation to individual loan originations in connection with closed-end mortgage transactions to account for Dodd-Frank Act amendments to TILA and provide greater clarity and flexibility. Specifically, the proposed provisions would preserve, with some refinements, the prohibition on the payment or receipt of commissions or other loan originator compensation based on the terms of the transaction (other than loan amount) and on loan originators being compensated simultaneously by both consumers and other parties in the same transaction. To further reduce potential steering incentives for loan originators created by certain compensation arrangements, the proposed rule would also clarify and revise restrictions on pooled compensation, profit-sharing, and bonus plans for loan originators, depending on the potential for incentives to steer consumers to different transaction terms.

Finally, the proposal would make two changes to the current record retention provisions of § 1026.25 of TILA. The proposed provisions would: (1) Require a creditor to maintain records of the compensation paid to a loan originator organization or the creditor's individual loan originators, and the governing compensation agreement, for three years after the date of payment; and (2) require a loan originator organization to maintain records of the compensation it receives from a creditor, a consumer, or another person and that it pays to its individual loan originators, as well as the compensation agreement that governs those receipts or payments, for three years after the date of the receipts or payments. In addition, creditors would be required to make and maintain, for three years, records to show that they made available to a consumer a comparable, alternative loan when required by the proposed rule and complied with the requirement that where discount points and origination points or fees are charged, there be a bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan. By ensuring that records associated with loan originator compensation are retained for a time period commensurate with the statute of limitations for causes of action under TILA section 130 and are readily available for examination, these proposed modifications to the existing recordkeeping provisions will prevent circumvention or evasion of TILA and facilitate compliance.

The legal basis for the proposed rule is discussed in detail in the legal authority analysis in part IV and in the section-by-section analysis in part V, above.

3. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

For purposes of assessing the impacts of the proposals under consideration on small entities, ''small entities'' are defined in the RFA to include small businesses, small non-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the North American Industry Classification System (''NAICS'') classifications and size standards.[116] 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

During the Small Business Review Panel process, the Bureau identified six categories of small entities that may be subject to the proposed rule for purposes of the RFA:

- Commercial banks (NAICS 522110);
- Savings institutions (NAICS 522120);[117]
- Credit unions (NAICS 522130);
- Firms providing real estate credit (NAICS 522292);
- Mortgage brokers (NAICS 522310); and
- Small non-profit organizations.

Commercial banks, savings institutions, and credit unions are small businesses if they have $175 million or less in assets. Firms providing real estate credit and mortgage brokers are small businesses if their average annual receipts do not exceed $7 million.

A small non-profit organization is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. Small non-profit organizations engaged in loan origination typically perform a number of activities directed at increasing the supply of affordable housing in their communities. Some small non-profit organizations originate mortgage loans for low and moderate-income individuals while others purchase loans originated by local community development lenders.

The following table provides the Bureau's estimated number of affected and small entities by NAICS Code and engagement in loan origination:

[116] The current SBA size standards are available on the SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[117] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

Category	NAICS Code	Total entities	Small entities	Entities that originate any mortgage loans [b]	Small entities that originate any mortgage loans
Commercial Banking	522110	6,596	3,764	[a] 6,362	[a] 3,597
Savings Institutions	522120	1,145	491	[a] 1,138	[a] 487
Credit Unions	522130	7,491	6,569	[a] 4,359	[a] 3,441
Real Estate Credit [c e]	522292	2,515	2,282	2,515	[a] 2,282
Mortgage Brokers [e]	522310	8,051	8,049	[d] N/A	[d] N/A
Total		25,798	21,155	14,374	9,807

Source: HMDA, Bank and Thrift Call Reports, NCUA Call Reports, NMLSR Mortgage Call Reports.
[a] For HMDA reporters, loan counts from HMDA 2010. For institutions that are not HMDA reporters, loan counts projected based on Call Report data fields and counts for HMDA reporters.
[b] Entities are characterized as originating loans if they make one or more loans. If loan counts are estimated, entities are counted as originating loans if the estimated loan count is greater than one.
[c] NMLSR Mortgage Call Report (''MCR'') for Q1 and Q2 of 2011. All MCR reporters that originate at least one loan or that have positive loan amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers). For institutions with missing revenue values revenues were imputed using nearest neighbor matching of the count of originations and the count of brokered loans.
[d] Mortgage Brokers do not originate (back as a creditor) loans.
[e] Data do not distinguish nonprofit from for-profit organizations, but Real Estate Credit and Mortgage Brokers categories presumptively include nonprofit organizations.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report

(1) Reporting Requirements

The proposed rule does not impose new reporting requirements.

(2) Recordkeeping Requirements

Regulation Z currently requires creditors to create and maintain records to demonstrate their compliance with provisions that apply to the compensation paid to or received by a loan originator. As discussed above in part V, the proposed rule would require creditors to retain these records for a three-year period, rather than for a two-year period as currently required. The Bureau is soliciting comment on extending the record retention period to five years. The proposed rule would apply the same requirement to organizations when they act as a loan originator in a transaction, even if they do not act as a creditor in the transaction. The proposed recordkeeping requirements, however, would not apply to individual loan originators. In addition, creditors would be required to make and maintain records for three years to show that they made available to a consumer a comparable, alternative loan when required by this proposed rule and complied with the requirement that where discount points and origination points or fees are charged, there be bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan. The Bureau is also soliciting comment on extending this record retention period to five years.

As discussed in the section-by-section analysis, the Bureau recognizes that extending the record retention requirement for creditors from two years for specific information related to loan originator compensation and discount points and origination points and fees, as currently provided in Regulation Z, to three years may result in some increase in costs for creditors. The Bureau believes, however, that creditors should be able to use existing recordkeeping systems to maintain the records for an additional year at minimal cost. Similarly, although loan originator organizations may incur some costs to establish and maintain recordkeeping systems, loan originator organizations may be able to use existing recordkeeping systems that they maintain for other purposes at minimal cost. During the Small Business Review Panel process, the SERs were asked about their current record retention practices and the potential impact of the proposed enhanced record retention requirements. Of the few SERs who provided feedback on the issue, one creditor stated that it maintained detailed records of compensation paid to all of its employees and that a regulator already reviews its compensation plans regularly, and another creditor reported that it did not believe the proposed record retention requirement would require it to change its current practices. Therefore, the Bureau does not believe that the record retention requirements will create undue burden for small entity creditors and loan originator organizations.

(3) Compliance Requirements

The proposal contains both specific proposed provisions with regulatory or commentary language (proposed provisions) as well as requests for comment on modifications where regulatory or commentary language was not specifically included (additional proposed modifications). The possible compliance costs for small entities from each major component of the proposed rule are presented below. In most cases, the Bureau presents these costs against a pre-statute baseline. As noted above in the section 1022(b)(2) analysis in part VII above, provisions where the Bureau has used its exemption authority are discussed relative to the statutory provisions (a post-statute baseline). The analysis below considers the benefits, costs, and impacts of the following major proposed provisions on small entities:

1. Upfront points and fees
2. Compensation based on transaction's terms
3. Qualification for mortgage originators

(a) Upfront Points and Fees

The Dodd-Frank Act prohibits consumer payment of upfront points and fees in all residential mortgage loan transactions (as defined in the Dodd-Frank Act) except those where no one other than the consumer pays a loan originator compensation tied to the transaction (*e.g.,* a commission). As discussed in the Background and section-by-section analysis, the Bureau is proposing to require that before a creditor or loan originator may impose discount points and origination points or fees on a consumer, the creditor must make available to the consumer a comparable, alternative loan that does not include such points or fees. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.)

The Bureau is proposing two safe harbors for how a creditor may comply with the requirement to make available a comparable, alternative loan (unless the consumer is unlikely to qualify for the loan). In transactions that do not involve a mortgage broker, a creditor will be deemed to have made available a comparable, alternative loan to a consumer if, any time prior to application that the creditor provides to the consumer an individualized quote for a loan that includes discount points and origination points or fees, the creditor also provides a quote for the comparable, alternative loan. In transactions that involve mortgage brokers, a creditor will be deemed to have made a comparable, alternative loan available to consumers if it provides to mortgage brokers the pricing for all of its comparable, alternative loans that do not include discount points and origination points or fees. Mortgage brokers then will provide quotes to consumers for loans that do not include discount points and origination points or fees when presenting different loan options to consumers. The requirement would not apply where the consumer is unlikely to qualify for the comparable, alternative loan.

The Bureau is also seeking comment on a number of related issues, including whether the Bureau should adopt a ''bona fide'' requirement to ensure that consumers receive value in return for paying discount points and origination points or fees, and different options for structuring such a requirement; whether additional adjustments to the proposal concerning the treatment of affiliate fees would make it easier for consumers to compare offers between two or more creditors; whether to take a different approach concerning situations in which a consumer does not qualify for a comparable, alternative loan that does not include discount points and origination points or fees; and whether to require information about a comparable, alternative loan be provided not just in connection with informal quotes, but also in advertising and at the time that consumers are provided disclosures three days after application. These issues are described in more detail in the section-by-section analysis, above.

Benefits for Small Entities: The Bureau's proposal with regard to points and fees has a number of potential benefits for small entities. First, relative to the Dodd-Frank Act ban on points and fees, allowing consumers to pay upfront discount points and origination points or fees in transactions in certain circumstances would increase the range of mortgage transactions available to consumers. Thus, the increased range of payment options would allow small creditors and loan originator organizations to be more flexible in marketing different mortgage loan products to consumers. The availability of different payment options also would enhance the ability of small creditors and loan originator organizations to enter into certain mortgage loan transactions with consumers. Furthermore, a consumer's ability to refinance is costly to the creditor. Preserving consumers' ability to choose to pay interest upfront in the form of discount points would reduce the ultimate cost to creditors from both loan default and prepayment.

Moreover, the ability of small creditors to charge discount points in exchange for lower interest rates would accommodate those consumers who prefer to pay more at settlement in exchange for lower monthly interest charges and could produce a greater volume of available credit in residential mortgage markets. Preserving this ability would potentially allow a wider access to homeownership, which would benefit consumers, creditors, loan originator organizations, and individual loan originators. The ability to charge origination fees up front also would allow small creditors to recover fixed costs at the time they are incurred rather than over time through increased interest payments or through the secondary market prices. And, similarly, preserving the flexibility for affiliates of creditors and loan originator organizations to charge fees upfront should allow for these firms to charge directly for their services. This means that creditors and loan originator organizations may be less likely to divest such entities than if the Dodd-Frank Act mandate takes effect as written.

Costs for Small Entities: As described, in the absence of the proposed rule in which the Bureau exercises its exemption authority, generally the only mortgage transactions permitted pursuant to the Dodd-Frank Act would be loans that do not include any discount points and origination points or fees. Under the proposed rule, creditors would be required in most instances to make available these loans. (Making available the comparable, alternative loan is not necessary if the consumer is unlikely to qualify for such a loan.) To ease compliance burdens, the Bureau is proposing two safe harbors for how a creditor may comply with the requirement to make available a comparable, alternative loan available.

The requirement that creditors must generally make available loans that do not include discount points and origination points or fees (unless the consumer is unlikely to qualify for such a loan) would impose some restrictions on small creditors and loan originator organizations. As discussed in part VII, this requirement may impose costs on smaller entities with more limited access to the secondary market or to affordable hedging opportunities. There may be instances where a consumer's choice of the comparable, alternative loan from a small creditor increases that firm's financial risk; however for the reasons discussed, the Bureau believes such instances would be rare. The Bureau seeks comment on the costs to small entities from this requirement.

The proposed rule also solicits comment on whether the Bureau should adopt a ''bona fide'' requirement to ensure that consumers receive value in return for paying discount points and origination points or fees, and different options for structuring such a requirements. To the extent the final rule imposes a bona fide requirement that departs from current market pricing practices, this condition may restrict small entities' flexibility in pricing. Implementing a requirement that the payment of discount points and origination points or fees be bona fide may also impose additional compliance and monitoring costs. Small creditors may already need to determine and monitor when discount points are bona fide for the purposes of the Bureau's forthcoming ATR rulemaking; and to the extent that the definitions of bona fide discount points in the ATR context and bona fide discount points and origination points or fees are similar, the additional costs would be reduced. Regarding compliance, the proposal seeks comments on market based approaches or approaches based on firms' own pricing policies; in either case, compliance would likely entail increased records retention.

Moreover, the Bureau is soliciting comment on whether to require information about the comparable, alternative loan to be provided not just in connection with informal quotes, but also in advertising and after application by providing a Loan Estimate, or the first page of the Loan Estimate, which is the integrated disclosures under TILA and RESPA proposed by the Bureau in the TILA–RESPA Integration Proposal.

Changes to the advertising rules under Regulation Z are unlikely to raise specific costs of compliance for small entities, apart from those costs associated with learning about and adjusting to any new regulations. The

requirement to provide the Loan Estimate for the comparable, alternative loan would marginally increase cost for some small entity originators. The Bureau seeks comments on the specific impacts these alternatives may have for small entities.

(b) Compensation Based on Transaction Terms

The proposed rule clarifies and revises restrictions on pooled compensation, profit-sharing, and bonus plans for loan originators, depending on the potential incentives to steer consumers to different transaction terms. As discussed in the section-by-section analysis to proposed 1026.36(d)(1)(iii), the proposal regarding bonus plans would permit employers to make contributions from general profits derived from mortgage activity to 401(k) plans, employee stock option plans, and other ''qualified plans'' under section 401(a) of the IRC and ERISA, as applicable, and also would permit employers to pay bonuses or make contributions to non-qualified profit-sharing or retirement plans from general profits derived from mortgage activity if: (1) The loan originator affected has originated five or fewer mortgage transactions during the last 12 months; or (2) the company's mortgage business revenues are limited (the Bureau is seeking comment on whether 50 percent or 25 percent of total revenues would be an appropriate test for such limitation, and on other related issues). The Bureau is also proposing, to permit compensation funded by general profits derived from mortgage activity in the form of bonuses and other payments under profit-sharing plans and contributions to non-qualified defined benefit or contribution plans where an individual loan originator is the loan originator for five or fewer transactions within the 12-month period preceding the payment of the compensation. Even though contributions and bonuses could be funded from general mortgage profits, the amounts paid to individual loan originators could not be based on the terms of the transactions that the individual had originated.

With respect to the proposal to permit bonuses under profit-sharing plans and contributions to non-qualified retirement plans where the revenues of the mortgage business do not exceed a certain percentage of the total revenues of the organization (or, as applicable, the business until to which the profit-sharing plan applies), for small depository institutions and credit unions (defined as those institutions with assets under $175 million), regulatory data from 2010 indicate that at the higher threshold of 50 percent of total revenue, roughly 2 percent of small commercial banks (about 75 banks) and 3 percent of small credit unions (about 200 credit unions) would remain subject to the proposed restrictions. Using a lower threshold of 25 percent of revenue, roughly 28 percent of small commercial banks and 22 percent of small credit unions would be subject to the proposed restrictions. The numbers are larger and more significant for small savings institutions whose primary business focus is on residential mortgages. At the higher threshold, 59 percent of these firms would be restricted from paying bonuses based on mortgage-related profits to their individual loan originators.[118] The Bureau lacks comprehensive data on nonbank lenders and, in particular, does not have information regarding the precise range of business activities that such companies engage in. As a result, it is unclear at this time the extent to which such nonbank lenders will face restrictions on their compensation practices.

Firms that did not change their compensation practices in response to the current rule and the Dodd-Frank Act and, thus, currently offer compensation arrangements that would be prohibited under the proposed rule, will incur costs. These include costs from changing internal accounting practices, renegotiating the remuneration terms in the contracts of existing employees, and any other industry practice related to these methods of compensation. For these firms, the prohibition on compensation based on transaction terms may contribute to adverse selection among individual loan originators, a possible lower average quality of individual loan originators in such a firm, and higher retention costs. The discrete nature of the threshold also implies that some loan originators may now suffer the disadvantage of facing competitors with fewer restrictions on compensation. These potential differential effects may be greater for small entities. The Bureau seeks comments and data on the current compensation practices of those firms at or above the thresholds.

During the Small Business Review Panel process, a SER stated that there should be no threshold limit because any limit would disadvantage small businesses that originate only mortgages. In response to this and other SERs feedback, the Small Business Review Panel recommended that the Bureau seek public comment on the ramifications for small businesses and other businesses of setting the revenue limit at 50 percent of company revenue or at other levels. The Small Business Review Panel also recommended that the Bureau solicit comment on the treatment of qualified and non-qualified plans and whether treating qualified plans differently than non-qualified plans would adversely affect small lenders and brokerages relative to large lenders and brokerage. While the Bureau expects that for some small entities, the de minimis exception should address some of the concerns expressed by the SERs through the Small Business Review Panel process, the Bureau is seeking comment on these issues.

(c) Loan Originator Qualification Requirements

The proposal would implement a Dodd-Frank Act provision requiring both individual loan originators and their employers to be ''qualified'' and to include their license or registration numbers on loan documents. Where an individual loan originator is not already required to be licensed under the SAFE Act, the proposal would require his or her employer to ensure that the individual loan originator meets character, fitness, and criminal background check standards that are equivalent to SAFE Act requirements and receives training commensurate with the individual loan originator's duties. Employers would be required to ensure that their individual loan originator employees are licensed or registered under the SAFE Act where applicable. Employers and the individual loan originators that are primarily responsible for a particular transaction would be required to list their license or registration numbers on key loan documents along with their names.

Costs to Small Entities: Employees of depositories and bona fide non-profit organizations do not have to meet the SAFE Act standards that apply only to licensing, such as taking pre-licensure classes, passing a test, meeting character and fitness standards, having no felony convictions within the previous seven years, or taking annual continuing education classes. The proposed rule would require these institutions to adopt character and criminal record screening and ongoing training requirements. However, the Bureau

[118] Estimates are based on 2010 Call Report data. Revenue from loan originations is assumed to equal fee and interest income from 1–4 family residences as reported. To the extent that other revenue on the Call Reports is tied to loan originations, these numbers may be underestimated. Revenue estimates for credit unions are not available; instead, the percentage of assets held in 1–4 family residential real estate is used instead.

believes that many of these entities already have adopted screening and training requirements, either to satisfy safety-and-soundness requirements or as a matter of good business practice.

For any entity that adopted screening and training requirements in the first instance, the Bureau estimates the costs to include the cost of a criminal background check and the time involved in checking employment and character references of an applicant. The time and cost required to provide occasional, appropriate training to individual loan originators will vary greatly depending on the lending activities of the entity and the skill and experience level of the individual loan originators; however, the Bureau anticipates that the training that many non-profit and depository individual loan originator employees already receive will be adequate to meet the proposed requirement. The Bureau expects that in no case would the training needed to satisfy the proposed requirement be more comprehensive, time-consuming, or costly than the online training approved by the NMLSR to satisfy the continuing education requirement imposed under the SAFE Act on those individuals who are subject to state licensing.

The requirement to include the NMLSR unique identifiers and names of loan originators on loan documents may impose some additional costs relative to current practice. However, this may be mitigated by the fact that the Federal Housing Finance Agency already requires the NMLSR numerical identifier of individual loan originators and loan originator organizations to be included on all loan applications for Fannie Mae and Freddie Mac loans.

(d) Other Provisions

(i) Mandatory Arbitration and Credit Insurance: The proposal would implement the Dodd-Frank Act requirements that prohibit agreements requiring consumers to submit any disputes that may arise to mandatory arbitration rather than filing suit in court and that ban the financing of premiums for credit insurance. Firms may incur some compliance cost such as amending standard contract form to reflect these changes.

(ii) Dual Compensation, Pricing Concessions, and Proxies: The proposed rule contains provisions that would adjust existing rules governing compensation to individual loan originations in connection with closed-end mortgage transactions to account for Dodd-Frank Act amendments to TILA and provide greater clarity and flexibility.

These proposed provisions would preserve the current prohibition on the payment or receipt of commissions or other loan originator compensation based on the terms of the transaction (other than loan amount) and on loan originators being compensated simultaneously by both consumers and other parties in the same transaction. The proposal would, however, revise the Loan Originator Final Rule to provide that if a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator organization may pay compensation in connection with the transaction (*e.g.,* a commission) to individual loan originators and the individual loan originators may receive compensation from the loan originator organization. The proposed rule also would clarify that payments to a loan originator paid on the consumer's behalf by a person other than a creditor or its affiliates, such as a non-creditor seller, home builder, home improvement contractor, or realtor, are considered compensation received directly from the consumer if they are made pursuant to an agreement between the consumer and the person other than the creditor or its affiliates.

In addition, the proposed rule would allow reductions in loan originator compensation in a limited set of circumstances where there are unanticipated increases in closing costs from non-affiliated third parties in a violation of applicable law (such as a tolerance violation under Regulation X). The proposed rule would also provide additional guidance on determining whether a factor used as a basis for compensation is prohibited as a ''proxy'' for a transaction term.

These provisions will provide greater flexibility, relative to the statutory provisions of the Dodd-Frank Act, for firms needing to comply with the regulations. This greater clarity and flexibility should lower any costs of compliance for small entities by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation. These provisions of the proposed rule would therefore reduce the compliance burdens on small entities. The Bureau seeks comments on the specific impacts these provisions may have for small entities.

(4) Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

Section 603(b)(4) of the RFA requires an estimate of the classes of small entities that will be subject to the requirements. The classes of small entities that will be subject to the reporting, recordkeeping, and compliance requirements of the proposed rule are the same classes of small entities that are identified above in part VIII.

Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau anticipates that the professional skills required for compliance with the proposed rule are the same or similar to those required in the ordinary course of business of the small entities affected by the proposed rule. Compliance by the small entities that will be affected by the proposed rule will require continued performance of the basic functions that they perform today.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The proposal contains restrictions on loan originator compensation practices, prerequisites to the making of a mortgage transaction with discount points and origination points or fees under most circumstances, requirements for loan originators to be qualified and licensed or registered, and restrictions on mandatory arbitration and the financing of certain credit insurance premiums. The Bureau has identified certain other Federal rules that relate in some fashion to these areas and has considered to what extent they may duplicate, overlap, or conflict with this proposal. Each of these is discussed below.

The Bureau's Regulation X, 12 CFR part 1024, implements RESPA. The regulation requires, among other things, the disclosure to consumers pursuant to RESPA of real estate settlement costs. The settlement costs required to be disclosed under Regulation X include discount points and origination charges. *See* 12 CFR part 1024, app. C. Thus, Regulation X governs the disclosure of certain charges that this proposal would regulate substantively. The Bureau believes, however, that substantive restrictions on the charging of discount points and origination points or fees, as well as substantive restrictions on loan originator compensation, are distinct and independent from rules governing how such charges must be disclosed. Accordingly, the Bureau does not believe this proposal duplicates, overlaps, or conflicts with Regulation X.

The Bureau's Regulations G, 12 CFR part 1007, and H, 12 CFR part 1008,

implement the SAFE Act. Those regulations include the requirements pursuant to the SAFE Act that individual loan originators be qualified and licensed or registered, as applicable. As noted, this proposal also contains certain qualification, registration, and licensing requirements. This proposal, however, supplements the existing requirements of Regulations G and H, to the extent they apply to persons subject to this proposal's requirements. Where a person is already subject to the same kind of requirement that this proposal imposes pursuant to Regulation G or H, this proposal cross-references the existing requirement to avoid duplication. The Bureau believes this proposal therefore does not duplicate, overlap, or conflict with Regulations G and H. If the Bureau implements TILA section 129B(b)(2) in the final rule, the Bureau will endeavor to minimize any potential overlap with the procedures currently required by Regulation G.

In the section-by-section analysis to § 1026.36(d)(1)(i), above, the Bureau notes the Interagency Guidance on incentive compensation. 75 FR 36395 (Jun. 17, 2010). As discussed there, the Interagency Guidance was issued to help ensure that incentive compensation policies at large depository institutions do not encourage imprudent risk-taking and are consistent with the safety and soundness of the institutions. As also noted above, however, the Bureau's proposed rule does not affect the Interagency Guidance on loan origination compensation. While certain compensation practices may violate either the Interagency Guidance or this proposal but not the other, no practice is mandated by one and also prohibited by the other. Accordingly, the Bureau believes that this proposal does not conflict with the Interagency Guidance. The Bureau also believes that there is no duplication or overlap between the two.

In addition to existing Federal rules, the Bureau is also in the process of several other rulemakings relating to mortgage credit to implement requirements of the Dodd-Frank Act. These other rulemakings are discussed in part II.E, above. As noted there, the Bureau is coordinating carefully the development of those proposals and final rules. Among those that include provisions potentially intersecting with this proposal are the TILA–RESPA Integration, HOEPA, and ATR rulemakings.

- Under the TILA–RESPA Integration Proposal, the integrated disclosures must include an NMLSR ID, which parallels proposed § 1026.36(g)(1)(ii) in this notice. The Bureau has sought to avoid duplication, overlap, or conflict in this regard through proposed comment 36(g)(1)(ii)–1, which states that an individual loan originator may comply with the requirement in § 1026.36(g)(1)(ii) by complying with the applicable provision governing disclosure of NMLSR IDs in rules issued by the Bureau under the TILA–RESPA Integration rulemaking.

The ATR and HOEPA rulemakings both involve the concept of bona fide discount points. As discussed in the section-by-section analysis to proposed § 1026.36(d)(2)(ii)(C), this proposal includes an analogous concept in providing that no discount points and origination points or fees may be imposed on the consumer in certain transactions unless there is a bona fide reduction in the interest rate. The same discussion refers to the 2011 ATR Proposal and notes the parallel, while also recognizing that the two contexts may not necessarily call for an identical definition of ''bona fide'' given the differences between the purposes and scope of the requirements. The Bureau intends to coordinate carefully between this rulemaking and the ATR and HOEPA rulemakings with respect to any definitions of bona fide for their respective purposes, to ensure that they create no duplication, overlap, or conflict.

6. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

a. Payments of Upfront Points and Fees

The Dodd-Frank Act prohibits consumers from making an ''upfront payment of discount points, origination points, or fees'' to a loan originator, creditor, or their affiliates in all retail and wholesale loan originations where the loan originator is compensated by creditors or brokerage firms. During the Small Business Review Panel process, one proposal the Bureau presented to the SERs for consideration concerned the nature of permissible origination fees. Specifically the Bureau asked the SERs to provide feedback on the proposal that consumers could, at the time of origination, remit to the loan originator, creditor, or their affiliates payment for bona fide or third-party charges connected with this origination, if these fees were independent of the size of the loan as well as its terms.

This condition reflected the Bureau's belief that the actual costs incurred in originating a loan, whether in the wholesale or retail market, did not vary materially with the size of the initial loan balance. Under such constant costs, the requirement that fees not vary with the balance would benefit consumers in two distinct ways. First, it would likely improve market efficiency by requiring fees to consumers to mirror the actual costs of loan origination, precisely as they would in a competitive market, and consequently lower consumer costs. Second, it would eliminate an potential source of misinterpretation by consumers by essentially precluding originators from using the term ''points'' when referring to both origination points (charges to the borrower for originating the loan) and discount points (charges to the borrower that are exchanged for future interest payments).

Industry, through both the Small Business Review Panel process and outreach, and consumer groups raised concerns with this proposal. SERs, in particular, raised objections focusing on the potential that the requirement would disadvantage smaller creditors. SERs and others also raised objections to the validity of the assumption of constant origination costs.

Several SERs participating in Small Business Review Panel and participants in outreach calls asserted that, contrary to the Bureau's supposition, the economic costs of origination do vary with the loan balance and related loan characteristics. Two robust examples were cited in support of this assertion. The first involved GSE-imposed loan level pricing adjustments based on loan balance, which are incurred in the sale of mortgages to the secondary market. The second involved loans subsidized through the provision of an FHA or VA-funded financial guarantee against default by the primary borrower. More extensive services are required to originate such a loan, including efforts expended on consumer qualification and on certification of the terms of the guarantee per dollar of initial loan balance, than are required on a conventional loan.

In addition, certain costs of hedging risk, incurred by creditors during and after origination vary with loan size. The most common example of this is the cost to the creditor of buying various forms of derivative securities to hedge the financial risks of newly-originated mortgage loans, the costs of which do vary with loan size and are incurred by creditors merely warehousing such loans for resale and those intending to hold these mortgages in portfolio.

In response to the feedback it obtained from the SERs during the Small Business Review Panel process, as well as feedback obtained through

other outreach efforts, the Bureau has not proposed to restrict origination fees from varying with the size of the loan. Instead, an alternative provision, developed with the benefit of the SERs that met with the Small Business Review Panel as well as additional outreach to industry and consumer groups, would require a creditor to make available to a consumer a comparable, alternative loan that does not include discount points and origination points or fees as a prerequisite to the creditor or loan originator organization imposing discount points and origination points or fees on the consumer in the transaction (unless the consumer is unlikely to qualify for the comparable, alternative loan). Further, no discount points and origination points or fees could be imposed on the consumer unless there was a bona fide reduction in the interest rate. These provisions within the Bureau's current proposal are designed to accomplish a similar purpose as the flat fee requirement, namely to ensure that consumers are in the position to shop and receive value for origination points and fees, but do so in a way to minimize adverse consequences for industry and consumers that the flat fee requirement might entail.

7. Discussion of Impact on Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters. 5 U.S.C. 603(d). To satisfy this statutory requirement, the Bureau notified the Chief Counsel on May 9, 2012, that the Bureau would collect the advice and recommendations of the same SERs identified in consultation with the Chief Counsel during the Small Business Review Panel process concerning any projected impact of the proposed rule on the cost of credit for small entities.[119] The Bureau sought and collected the advice and recommendations of the SERs during the Small Business Review Panel Outreach Meeting regarding the potential impact on the cost of business credit, since the SERs, as small providers of financial services, could also provide valuable input on any such impact related to the proposed rule.[120]

The Bureau had no evidence at the time of the Small Business Review Panel Outreach Meeting that the proposals then under consideration would result in an increase in the cost of business credit for small entities under any plausible economic conditions. The proposals under consideration at the time applied to consumer credit transactions secured by a mortgage, deed of trust, or other security interest on a residential dwelling or a residential real property that includes a dwelling, and the proposals would not apply to loans obtained primarily for business purposes.[121]

At the Small Business Review Panel Outreach Meeting, the Bureau specifically asked the SERs a series of questions regarding any potential increase in the cost of business credit. Specifically, the SERs were asked if they believed any of the proposals under consideration would impact the cost of credit for small entities and, if so, in what ways and whether there were any alternatives to the proposals being considered that could minimize such costs while accomplishing the statutory objectives addressed by the proposal.[122] Although some SERs expressed the concern that any additional federal regulations, in general, had the potential to increase credit and other costs, all SERs responding to these questions stated that the proposals under consideration in this rulemaking would have little to no impact on the cost of credit to small businesses.

Based on the feedback obtained from SERs at the Small Business Review Panel Outreach Meeting, the Bureau currently has no evidence that the proposed rule would result in an increase in the cost of credit for small business entities. In order to further evaluate this question, the Bureau solicits comment on whether the proposed rule would have any impact on the cost of credit for small entities.

IX. Paperwork Reduction Act

A. Overview

The Bureau's collection of information requirements contained in this proposal, and identified as such, will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA) on or before publication of this proposal in the **Federal Register**. Under the Paperwork Reduction Act, the Bureau may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number.

This proposed rule would amend 12 CFR part 1026 (Regulation Z). Regulation Z currently contains collections of information approved by OMB, and the Bureau's OMB control number is 3170–0015 (Truth in Lending Act (Regulation Z) 12 CFR part 1026). As described below, the proposed rule would amend the collections of information currently in Regulation Z.

The title of this information collection is: Loan Originator Compensation. The frequency of response is on-occasion. The information collection requirements in this proposed rule are required to provide benefits for consumers and would be mandatory. *See* 15 U.S.C. 1601 *et seq.* Because the Bureau would not collect any information under the proposed rule, no issue of confidentiality arises. The likely respondents would be commercial banks, savings institutions, credit unions, mortgage companies (non-bank creditors), mortgage brokers, and non-profit organizations that make or broker closed-end mortgage loans for consumers.

Under the proposal, the Bureau would account for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain non-depository loan originator organizations. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of its estimated burden to non-depository institutions. Other Federal agencies, including the FTC, are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required, to use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the total estimated burden for the approximately 22,400 institutions subject to the proposal, including Bureau respondents,[123] would

[119] *See* 5 U.S.C. 603(d)(2)(A). The Bureau provided this notification as part of the notification and other information provided to the Chief Counsel with respect to the Small Business Review Panel process pursuant to section 609(b)(1) of the RFA.

[120] *See* 5 U.S.C. 603(d)(2)(B).

[121] *See* Outline of Proposals at appendix A.

[122] *See* the SBREFA Final Report, at app., appendix D, slide 38 *(PowerPoint slides from the Panel Outreach Meeting, ''Topic 7: Impact on the Cost of Business Credit'').*

[123] For purposes of this PRA analysis, the Bureau's respondents include 128 depository institutions and their depository institution

be approximately 64,700 hours annually and 169,600 one-time hours. For the 10,984 Bureau respondents subject to this proposal, the estimates for the ongoing burden hours are roughly 32,400 annually, and the total one-time burden hours are roughly 84,500.

The aggregate estimates of total burdens presented in this part IX are based on estimated costs that are averages across respondents. The Bureau expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size, complexity, and practices of the respondent.

B. Information Collection Requirements

1. Record Retention Requirements

Regulation Z currently requires creditors to create and maintain records to demonstrate their compliance with Regulation Z provisions regarding compensation paid to or received by a loan originator. As discussed above in part V, the proposed rule would require creditors to retain these records for a three-year period, rather than for a two-year period as currently required. The proposed rule would apply the same requirement to organizations when they act as a loan originator in a transaction, even if they do not act as a creditor in the transaction. In addition, creditors would be required to make and maintain records for three years to show that they made available to a consumer a comparable, alternative mortgage loan when required by this proposed rule and complied with the requirement that where discount points and origination points or fees are charged, there be bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan.

For the requirement extending the record retention requirement for creditors from two years, as currently provided in Regulation Z, to three years, the Bureau assumes that there is not additional marginal cost. For most, if not all firms, the required records are in electronic form. The Bureau believes that, as a consequence, all creditors should be able to use their existing recordkeeping systems to maintain the required documentation for mortgage origination records for one additional year at a negligible cost of investing in new storage facilities.

Loan originator organizations, but not creditors, will incur costs from the new requirement to retain records related to compensation. For the requirement that organizations retain records related to compensation on loan transactions, these firms will need to build the requisite reporting regimes. At some firms this may require the integration of information technology systems; for others simple reports can be generated from existing core systems.

For the 8,051 Bureau respondents that are non-depository loan originator organizations but not creditors, the one-time burden is estimated to be roughly 162,800 hours to review the regulation and establish the requisite systems to retain compensation information. The Bureau estimates the requirement for these Bureau respondents to retain documentation of compensation arrangements is assumed to require 64,400 ongoing burden hours annually. The Bureau has allocated to itself one-half of this burden.

The proposal would require a creditor to retain records that it made available to a consumer, when required, a comparable, alternative loan that does not include discount points and origination points or fees, or that it made a good-faith determination that a consumer is unlikely to qualify for it. The Bureau believes that there is no additional cost or burden associated with this requirement because it believes that most, if not all creditors, already keep records of quotes of loan terms that they make to individual consumers as a matter of usual and customary practice. The Bureau believes that, as a consequence, all creditors should be able to use their existing recordkeeping systems to maintain the required documentation. The Bureau seeks public comment on how creditors currently keep track of quotes they have made to particular consumers and any additional costs from the requirement to track compliance with the requirements regarding the comparable, alternative loan.

2. Requirement To Obtain Criminal Background Checks, Credit Reports, and Other Information for Certain Individual Loan Originators

To the extent loan originator organizations employ or retain the services of individual loan originators who are not required to be licensed under the SAFE Act, and who are not so licensed, the loan originator organizations would be required to obtain a criminal background check and credit report for the individual loan originators. Loan originator organizations would also be required to obtain from the NMLSR or individual loan originator information about any findings against such individual loan originator by a government jurisdiction. In general, the loan originator organizations that would be subject to this requirement are depository institutions (including credit unions) and non-profit organizations whose loan originators are not subject to State licensing because the State has determined the organization to be a bona fide non-profit organization. The burden of obtaining this information may be different for a depository institution than it is for a non-profit organization because depository institutions already obtain criminal background checks for their loan originators to comply with Regulation G and have access to information about findings against such individual loan originator by a government jurisdiction through the NMLSR.

a. Credit Check

Both depository institutions and non-profit organizations will incur one-time costs related to obtaining credit reports for all existing loan originators and ongoing costs for all future loan originators that are hired or transfer into this function. For the estimated 2,843 Bureau respondents, which include depository institutions over $10 billion, their depository affiliates, and one-half the estimated burdens for the non-profit non-depository organizations, this one time estimated burden would be 2,950 hours and the estimated on going burden would be 150 hours.

b. Criminal Background Check

Depository institutions already obtain criminal background checks for each of their individual loan originators through the NMLSR for purposes of complying with Regulation G. A criminal background check provided by the NMLSR to the depository institution is sufficient to meet the requirement to obtain a criminal background check in this proposed rule. Accordingly, the Bureau believes they will not incur any additional burden.

Non-depository loan originator organizations that do not have access to information about criminal history in the NMLSR, including bona fide non-profit organizations, could satisfy the latter requirements by obtaining a national criminal background check.[124] For the assumed 200 non-profit originators and their 1000 loan

affiliates. The Bureau's respondents include an estimated 2,515 non-depository creditors, an assumed 200 not-for profit originators (which may overlap with the other non-depository creditors), and 8,051 loan originator organizations.

[124] This check, more formally known as an individual's FBI Identification Record, uses the individual's fingerprint submission to collect information about prior arrests and, in some instances, federal employment, naturalization, or military service.

originators,[125] the one-time burden is estimated to be roughly 265 hours.[126] The ongoing cost to perform the check for new hires is estimated to be 15 hours annually. The Bureau has allocated to itself one-half of these burdens.

c. Information About Findings Against the Individual by Government Jurisdictions

Depository institutions already obtain and have access to information about government jurisdiction findings against their individual loan originators through the NMLSR. Such information is sufficient to meet the requirement to obtain a criminal background check in this proposed rule. Accordingly, the Bureau does not believe they will incur significant additional burden.

The information for employees of non-profit organizations is generally not in the NMLSR. Accordingly, under the proposed rule a non-profit organization would have to obtain this information using individual statements concerning any prior administrative, civil, or criminal findings. For the assumed 1,000 loan originators who are employees of bona-fide non-profit organizations, the Bureau estimates that no more than 10 percent have any such findings by a governmental jurisdiction to describe. The one-time burden is estimated to be 20 hours, and the annual burden to obtain the information from new hires is estimated to be one hour.

C. Comments

Comments are specifically requested concerning: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (2) the accuracy of the estimated burden associated with the proposed collections of information; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. All comments will become a matter of public record. Comments on the collection of information requirements should be sent to the Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC, 20503, or by the Internet to *http://oira_submission@omb.eop.gov*, with copies to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by the Internet to *CFPB_Public_PRA@cfpb.gov*.

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside bold arrows, and language that would be removed is shown inside bold brackets.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1601 *et seq.*

2. Section 1026.25 is amended by adding paragraph (c) to read as follows:

Subpart D—Miscellaneous

§ 1026.25 Record Retention.

* * * * *

►(c) *Records related to certain requirements for mortgage loans.*

(1) [Reserved]

(2) *Records related to requirements for loan originator compensation.* Notwithstanding the two-year record retention requirement in paragraph (a) of this section, for transactions subject to § 1026.36 of this part:

(i) A creditor must maintain records sufficient to evidence all compensation it pays to a loan originator organization (as defined in § 1026.36(a)(1)(iii)) or the creditor's individual loan originator (as defined in § 1026.36(a)(1)(ii)) and the compensation agreement that governs those payments for three years after the date of payment.

(ii) A loan originator organization must maintain records sufficient to evidence all compensation it receives from a creditor, a consumer, or another person, all compensation it pays to the loan originator organization's individual loan originators, and the compensation agreement that governs those receipts or payments for three years after the date of each receipt or payment.

(3) *Records related to requirements for discount points and origination points or fees.* For each transaction subject to § 1026.36(d)(2)(ii), the creditor must maintain for three years after the date of consummation records sufficient to evidence:

(i) The creditor has made available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees as required by § 1026.36(d)(2)(ii)(A) or, if such a loan was not made available to the consumer, a good-faith determination that the consumer was unlikely to qualify for such a loan; and

(ii) Compliance with the ''bona fide'' requirements under § 1026.36(d)(2)(ii)(C).◄

Subpart E—Special Rules for Certain Home Mortgage Transactions

3. Section 1026.36 is amended by:

a. Revising the section heading;

b. Revising paragraphs (a), (d)(1), (d)(2), and (e)(3)(i)(C);

c. Re-designating paragraph (f) as paragraph (j);

d. Adding new paragraph (f) and paragraphs (g), (h), and (i); and

e. Revising newly re-designated paragraph (j),

The revisions and additions read as follows:

§ 1026.36 Prohibited acts or practices ►and certain requirements for◄ [in connection with] credit secured by a dwelling.

(a) *Loan originator*►,◄ [*and*] *mortgage broker* ►, *and compensation*◄ *defined*— (1) *Loan originator.* ►(i) ◄For purposes of this section, the term ''loan originator'' means, with respect to a particular transaction, a person who [for compensation or other monetary gain, or in expectation of compensation or other monetary gain,]►takes an application,◄ arranges, ►offers,◄ negotiates, or otherwise obtains an extension of consumer credit for another person► in expectation of compensation or other monetary gain or for compensation or other monetary gain.◄ The term ''loan originator'' includes an employee of the creditor if

[125] The Bureau has not been able to determine how many loan originators organizations qualify as bona fide non-profit organizations or how many of their employee loan originators are not subject to SAFE Act licensing. Accordingly, the Bureau has estimated these numbers.

[126] The organizations are also assumed to pay $50 to get a national criminal background check. Several commercial services offer an inclusive fee, ranging between $48.00 and $50.00, for fingerprinting, transmission, and FBI processing. Based on a sample of three FBI-approved services, accessed on 2012–08–02: Accurate Biometrics, available at: *http://www.accuratebiometrics.com/index.asp*; Daon Trusted Identity Servs., available at: *http://daon.com/prints*; and Fieldprint, available at:*http://www.fieldprintfbi.com/FBISubPage_FullWidth.aspx?ChannelID=272*.

the employee meets this definition. The term ''loan originator'' includes [the] ►a◄ creditor ►for the transaction ◄[only] if the creditor does not [provide the funds for]►finance ◄the transaction at consummation out of the creditor's own resources, including drawing on a *bona fide* warehouse line of credit, or out of deposits held by the creditor►. The term ''loan originator'' includes all creditors for purposes of § 1026.36(f) and (g). The term does not include an employee of a manufactured home retailer who assists a consumer in obtaining or applying to obtain consumer credit, provided such employee does not take a consumer credit application, offer or negotiate terms of a consumer credit transaction, or advise a consumer on credit terms (including rates, fees, and other costs).

(ii) An ''individual loan originator'' is a natural person who meets the definition of ''loan originator'' in paragraph (a)(1)(i) of this section.

(iii) A ''loan originator organization'' is any loan originator, as defined in paragraph (a)(1)(i) of this section, that is not an individual loan originator◄.

(2) *Mortgage broker.* For purposes of this section, a mortgage broker with respect to a particular transaction is any loan originator that is not ►a creditor or the creditor's◄[an] employee [of the creditor].

►(3) *Compensation.* The term ''compensation'' includes salaries, commissions, and any financial or similar incentive provided to a loan originator for originating loans.◄

* * * * *

(d) *Prohibited payments to loan originators*—(1) *Payments based on transaction terms [or conditions]*. (i) ►Except as provided in paragraph (d)(1)(iii) of this section, in◄ [In] connection with a consumer credit transaction secured by a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms [or conditions]. ►If a loan originator's compensation is based in whole or in part on a factor that is a proxy for a transaction's terms, the loan originator's compensation is based on the transaction's terms. A factor (that is not itself a term of a transaction originated by the loan originator) is a proxy for the transaction's terms if the factor substantially correlates with a term or terms of the transaction and the loan originator can, directly or indirectly, add, drop, or change the factor when originating the transaction.◄

(ii) For purposes of this paragraph (d)(1), the amount of credit extended is not deemed to be a transaction term [or condition], provided compensation received by or paid to a loan originator, directly or indirectly, is based on a fixed percentage of the amount of credit extended; however, such compensation may be subject to a minimum or maximum dollar amount.

[(iii) This paragraph (d)(1) shall not apply to any transaction in which paragraph (d)(2) of this section applies.]

►(iii) Notwithstanding paragraph (d)(1)(i) of this section, an individual loan originator may receive, and a person may pay to an individual loan originator, compensation in the form of a contribution to a defined contribution plan or defined benefit plan that is a qualified plan and in which the individual loan originator participates, provided that the contribution is not directly or indirectly based on the terms of that individual loan originator's transactions subject to paragraph (d) of this section. In addition, notwithstanding paragraph (d)(1)(i) of this section, an individual loan originator may receive, and a person may pay, compensation in the form of a bonus or other payment under a profit-sharing plan sponsored by the person or a contribution to a defined benefit plan or defined contribution plan in which the individual loan originator participates that is not a qualified plan, even if the compensation directly or indirectly is based on the terms of the transactions subject to paragraph (d) of this section of multiple individual loan originators employed by the person during the time period for which the compensation is paid to the individual loan originator, provided that:

(A) The compensation paid to an individual loan originator is not directly or indirectly based on the terms of that individual loan originator's transactions subject to paragraph (d) of this section; and

(B) At least one of the following conditions is satisfied:

ALTERNATIVE 1—PARAGRAPH (d)(1)(iii)(B)(*1*):

(*1*) Not more than 50 percent of the total revenues of the person (or, if applicable, the business unit to which the profit-sharing plans applies) are derived from the person's mortgage business during the tax year immediately preceding the tax year in which the payment or contribution is made. The total revenues are determined through a methodology that is consistent with generally accepted accounting principles and, as applicable, the reporting of the person's income for purposes of Federal tax filings or, if none, any industry call reports filed regularly by the person. As applicable, the methodology also shall reflect an accurate allocation of revenues among the person's business units. Notwithstanding the provisions of subparagraph (d)(3) of this section, the revenues of the person's affiliates are not taken into account for purposes of this paragraph, provided that, if the profit-sharing plan applies to the affiliate, then the person's total revenues for purposes of this paragraph also include the total revenues of the affiliate. The total revenues that are derived from the mortgage business is that portion of the total revenues that are generated through a person's transactions subject to paragraph (d) of this section; or

ALTERNATIVE 2—PARAGRAPH (d)(1)(iii)(B)(*1*):

(*1*) Not more than 25 percent of the revenues of the person (or, if applicable, the business unit to which the profit-sharing plan applies) are derived from the person's mortgage business during the tax year immediately preceding the tax year in which the payment or contribution is made. The total revenues are determined through a methodology that is consistent with generally accepted accounting principles and, as applicable, the reporting of the person's income for purposes of Federal tax filings or, if none, any industry call reports filed regularly by the person. As applicable, the methodology also shall reflect an accurate allocation of revenues among the person's business units. Notwithstanding the provisions of subparagraph (d)(3) of this section, the revenues of the person's affiliates are not taken into account for purposes of this paragraph, provided that, if the profit-sharing plan applies to the affiliate, then the person's total revenues for purposes of this paragraph also include the total revenues of the affiliate. The total revenues that are derived from the mortgage business is that portion of the total revenues that are generated through a person's transactions subject to paragraph (d) of this section; or

(*2*) The individual loan originator was the loan originator for five or fewer transactions subject to paragraph (d) of this section during the 12-month period preceding the date of the decision to make the payment or contribution.◄

(2) *Payments by persons other than consumer*— ►(i) *Dual compensation.* (A) Except as provided in paragraph (d)(2)(i)(C) of this section, if◄ [If] any loan originator receives compensation directly from a consumer [in a consumer credit transaction secured by a dwelling]:

(►*1*◄[i]) No loan originator shall receive compensation, directly or indirectly, from any person other than the consumer in connection with the transaction; and

(►*2*◄[ii]) No person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) shall pay any compensation to a loan originator, directly or indirectly, in connection with the transaction.

►(B) Compensation directly from a consumer includes payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates.

(C) *Exception.* If a loan originator organization receives compensation directly from a consumer in connection with a transaction, the loan originator organization may pay compensation to an individual loan originator, and the individual loan originator may receive compensation from the loan originator organization.

(ii) *Restrictions on discount points and origination points or fees.* (A) If any loan originator receives compensation from any person other than the consumer in connection with a transaction, a creditor or a loan originator organization may not impose on the consumer any discount points and origination points or fees, as defined in paragraph (d)(2)(ii)(B) of this section, in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan.

(B) The term ''discount points and origination points or fees'' for purposes of this paragraph (d) and paragraph (e) of this section means all items that would be included in the finance charge under § 1026.4(a) and (b), and any fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2), that are payable at or before consummation by the consumer in connection with the transaction to a creditor or a loan originator organization, other than:

(*1*) Interest, including per-diem interest, or the time-price differential;

(*2*) Any bona fide and reasonable third-party charges not retained by the creditor or loan originator organization; and

(*3*) Items that are excluded from the finance charge under § 1026.4(c)(5), (c)(7)(v) and (d)(2).

(C) No discount points and origination points or fees may be imposed on the consumer in connection with a transaction subject to paragraph (d)(2)(ii)(A) of this section unless there is a bona fide reduction in the interest rate compared to the interest rate for the comparable, alternative loan that does not include discount points and origination points or fees required to be made available to the consumer under paragraph (d)(2)(ii)(A) of this section. For any rebate paid by the creditor that will be applied to reduce the consumer's settlement charges, the creditor must provide a bona fide rebate in return for an increase in the interest rate compared to the interest rate for the comparable, alternative loan that does not include discount points and origination points or fees required to be made available to the consumer under paragraph (d)(2)(ii)(A) of this section.◄

* * * * *

(e). * * *

(3) * * *

(i) * * *

(C) The loan with the lowest total dollar amount ►of discount points and origination points or fees. If two or more loans have the same total dollar amount of discount points and origination points or fees, the loan originator must present the loan with the lowest interest rate that has the lowest total dollar amount of discount points and origination points or fees.◄[for origination points or fees and discount points.]

* * * * *

►(f) *Loan originator qualification requirements.* A loan originator for a consumer credit transaction secured by a dwelling must comply with this paragraph (f) and be registered and licensed in accordance with applicable State and Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act, 12 U.S.C. 5102 *et seq.*), its implementing regulations (12 CFR part 1007 or part 1008), and State SAFE Act implementing law. To comply with this paragraph (f), a loan originator organization that is not a government agency or State housing finance agency must:

(1) Comply with all applicable State law requirements for legal existence and foreign qualification;

(2) Ensure that its individual loan originators are licensed or registered to the extent the individual is required to be licensed or registered under the SAFE Act, its implementing regulations, and State SAFE Act implementing law; and

(3) For each of its individuals who is not required to be licensed and is not licensed as a loan originator pursuant to § 1008.103 of this chapter or State SAFE Act implementing law:

(i) Obtain:

(A) A State and national criminal background check through the Nationwide Mortgage Licensing System and Registry (NMLSR) or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, a State and national criminal background check from a law enforcement agency or commercial service;

(B) A credit report from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act (15 U.S.C. 1681a(p)) secured, where applicable, in compliance with the requirements of section 604(b) of the Fair Credit Reporting Act (15 U.S.C. 1681b(b); and

(C) Information from the NMLSR about any administrative, civil, or criminal findings by any government jurisdiction or, in the case of an individual loan originator who is not a registered loan originator under the NMLSR, such information from the individual loan originator;

(ii) Determine, on the basis of the information obtained pursuant to paragraph (f)(3)(i) of this section and any other information reasonably available to the loan originator organization, that the individual loan originator:

(A) Has not been convicted of, or pleaded guilty or *nolo contendere* to, a felony in a domestic, foreign, or military court during the preceding seven-year period or, in the case of a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering, at any time; and

(B) Has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the individual loan originator will operate honestly, fairly, and efficiently; and

(iii) Provide periodic training covering Federal and State law requirements that apply to the individual loan originator's loan origination activities.

(g) *NMLSR ID on loan documents.* (1) For a transaction secured by a dwelling, a loan originator organization must include on the loan documents described in paragraph (g)(2) of this section, whenever each such loan document is provided to a consumer or presented to a consumer for signature, as applicable:

(i) Its name and NMLSR identification number (NMLSR ID), if the NMLSR has provided it an NMLSR ID; and

(ii) The name of the individual loan originator with primary responsibility for the origination and, if the NMLSR has provided such person an NMLSR ID, that NMLSR ID.

(2) The loan documents that must include the names and NMLSR IDs pursuant to paragraph (g)(1) of this section are:

(i) The credit application;

(ii) The disclosure provided under section 5(c) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604(c));

(iii) The disclosure provided under section 128 of the Truth in Lending Act (15 U.S.C. 1638);

(iv) The note or loan contract;

(v) The security instrument; and

(vi) The disclosure provided to comply with section 4 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2603).

(3) For purposes of this § 1026.36, NMLSR identification number means a number assigned by the Nationwide Mortgage Licensing System and Registry to facilitate electronic tracking of loan originators and uniform identification of, and public access to, the employment history of, and the publicly adjudicated disciplinary and enforcement actions against, loan originators.

(h) *Prohibition on mandatory arbitration clauses and waivers of certain consumer rights-* (1) *Arbitration.* A contract or other agreement in connection with a consumer credit transaction secured by a dwelling may not require arbitration or any other non-judicial procedure to resolve disputes arising out of the transaction. This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute arises between them, to use arbitration or other non-judicial procedure to resolve a dispute.

(2) *No waivers of Federal statutory causes of action.* A contract or other agreement in connection with a consumer credit transaction secured by a dwelling may not limit a consumer from bringing a claim in court, an arbitration, or other non-judicial procedure, pursuant to any provision of law, for damages or any other relief, in connection with any alleged violation of any Federal law. This prohibition applies to a post-dispute agreement to use arbitration or other non-judicial procedure to resolve a dispute, thus such an agreement may not limit the ability of a consumer to bring a covered claim through the agreed-upon non-judicial procedure.

(i) *Prohibition on financing single-premium credit insurance.* (1) A creditor may not finance any premiums or fees for credit insurance in connection with a consumer credit transaction secured by a dwelling. This prohibition does not apply to credit insurance for which premiums or fees are calculated and paid in full on a monthly basis.

(2) In this paragraph (i), ''credit insurance'':

(i) Includes insurance described in § 1026.4(d)(1) and (3) of this part, whether or not such insurance is voluntary; but

(ii) Excludes credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract and not paid to an affiliate of the creditor.◄

(►j◄[f]) This section does not apply to a home-equity line of credit subject to § 1026.40►, except that § 1026.36(h) and (i) applies to such credit when secured by the consumer's principal dwelling◄. Section 1026.36(d)►,◄[and] (e)►, (f), (g), (h), and (i)◄ does not apply to a loan that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D).

4. Supplement I to part 1026 is amended as follows:

a. Under *Section 1026.25—Record Retention:*

i. *25(a) General rule,* paragraph 5 is removed;

ii. New heading *25(c)(2) Records related to requirements for loan originator compensation* and paragraphs 1 and 2 are added.

b. Under *Section 1026.36—Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling:*

i. The heading is revised to read *Section 1026.36—Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling;*

ii. Paragraph 1 is revised;

iii. *36(a) Loan originator and mortgage broker defined,* the heading is revised to read *36(a) Loan originator, mortgage broker, and compensation defined,* paragraphs 1 and 4 are revised, and new paragraph 5 is added;

iv. *36(d) Prohibited payments to loan originators,* paragraph 1 is revised;

v. *36(d)(1) Payments based on transaction terms and conditions,* the heading is revised to read *36(d)(1) Payments based on transaction terms,* paragraphs 1 through 8 are revised, and new paragraph 10 is added;

vi. *36(d)(2) Payments by persons other than consumer,* new heading *36(d)(2)(i) Dual compensation* is added and paragraphs 1 and 2 are revised, new heading *36(d)(2)(ii) Restrictions on discount points and origination points or fees* and new paragraphs 1 through 3 are added, new heading *Paragraph 36(d)(2)(ii)(A)* and new paragraphs 1 through 4 are added, new heading *Paragraph 36(d)(2)(ii)(B)* and new paragraphs 1 through 4 are added;

vii. *36(e) Prohibition on steering, 36(e)(3) Loan options presented,* paragraph 3 is revised;

viii. New heading *36(f) Loan originator qualification requirements* and new paragraphs 1 and 2 are added;

ix. New heading *Paragraph 36(f)(1)* and new paragraph 1 are added;

x. New heading *Paragraph 36(f)(2)* and new paragraph 1 are added;

xi. New heading *Paragraph 36(f)(3),* and new paragraph 1 are added;

xii. New heading *Paragraph 36(f)(3)(i)* and new paragraph 1 are added;

xiii. New heading *Paragraph 36(f)(3)(ii)* and new paragraph 1 are added;

xiv. New heading *Paragraph 36(f)(3)(ii)(B)* and new paragraph 1 are added;

xv. New heading *Paragraph 36(f)(3)(iii)* and new paragraph 1 are added;

xvi. New headings *36(g) NMLSR ID on loan documents, Paragraph 36(g)(1)* and new paragraphs 1 and 2 are added;

xvii. New heading *Paragraph 36(g)(1)(ii)* and new paragraph 1 are added;

xviii. New heading *Paragraph 36(g)(2)* and new paragraph 1 are added.

Supplement I to Part 1026—Official Interpretations

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Subpart D—Miscellaneous

Section 1026.25—Record Retention

25(a) General rule.

* * * * *

[5. *Prohibited payments to loan originators.* For each transaction subject to the loan originator compensation provisions in § 1026.36(d)(1), a creditor should maintain records of the compensation it provided to the loan originator for the transaction as well as the compensation agreement in effect on the date the interest rate was set for the transaction. See § 1026.35(a) and comment 35(a)(2)(iii)–3 for additional guidance on when a transaction's rate is set. For example, where a loan originator is a mortgage broker, a disclosure of compensation or other broker agreement required by applicable State law that complies with § 1026.25 would be presumed to be a record of the amount actually paid to the loan

originator in connection with the transaction.]

* * * * *

►*25(c)(2) Records related to requirements for loan originator compensation.*

1. *Scope of records of loan originator compensation.* Section 1026.25(c)(2)(i) requires a creditor to maintain records sufficient to evidence all compensation it pays to a loan originator organization or the creditor's individual loan originators, as well as the compensation agreements that govern those payments for three years after the date of the payments. Section 1026.25(c)(2)(ii) requires that a loan originator organization maintain records sufficient to evidence all compensation it receives from a creditor, a consumer, or another person and all compensation it pays to the loan originator organization's individual loan originators, as well as the compensation agreements that govern those payments or receipts for three years after the date of the receipts or payments.

i. *Records sufficient to evidence payment and receipt of compensation.* Records are sufficient to evidence payment and receipt of compensation if they demonstrate the following facts: The nature and amount of the compensation; that the compensation was paid, and by whom; that the compensation was received, and by whom; and when the payment and receipt of compensation occurred. The records that are sufficient necessarily will vary on a case-by-case basis depending on the facts and circumstances, particularly with regard to the nature of the compensation. In addition to the compensation agreements themselves, which are to be retained in all circumstances, records of the payment and receipt of compensation to be maintained under § 1026.25(c)(2) might include, for example, and depending on the facts and circumstances, copies of required filings under applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001, *et seq.,* and the Internal Revenue Code (IRC) relating to qualified defined benefit and defined contribution plans; copies of qualified or non-qualified bonus and profit-sharing plans in which individual loan originator employees participate; the names of any loan originators covered by such plans; a settlement agent ''flow of funds'' worksheet or other written record; a creditor closing instructions letter directing disbursement of fees at consummation; records of any payments, distributions, awards, or other compensation made under any such agreements or plans. Where a loan originator is a mortgage broker, a disclosure of compensation or broker agreement required by applicable State law that recites the broker's total compensation for a transaction would be presumed to be a record of the amount actually paid to the loan originator in connection with the transaction.

ii. *Compensation agreement.* For purposes of § 1026.25(c)(2), a compensation agreement includes any agreement, whether oral, written, or based on a course of conduct that establishes a compensation arrangement between the parties (*e.g.,* a brokerage agreement between a creditor and a loan originator organization, provisions of employment contracts addressing payment of compensation between a creditor and an individual loan originator employee). Creditors and loan originators are free to specify what transactions are governed by a particular compensation agreement as they see fit. For example, they may provide, by the terms of the agreement, that the agreement governs compensation payable on transactions consummated on or after some future effective date (in which case, a prior agreement governs transactions consummated in the meantime). For purposes of applying the record retention requirement, the relevant compensation agreement for a given transaction is the agreement pursuant to which compensation for that transaction is determined, pursuant to the agreement's terms.

iii. *Three-year retention period.* The requirements in § 1026.25(c)(2)(i) and (ii) that the records be retained for three years after the date of receipt or payment, as applicable, means that the records are retained for three years after each receipt or payment, as applicable, even if multiple compensation payments relate to a single transaction. For example, if a loan originator organization pays an individual loan originator a commission consisting of two separate payments of $1,000 each on June 5 and July 7, 2012, then the organization loan originator is required to retain records sufficient to evidence the two payments through June 4, 2015, and July 6, 2015, respectively.

2. An example of § 1026.25(c)(2) as applied to a loan originator organization is as follows: Assume a loan originator organization originates only loans where the loan originator organization derives revenues exclusively from fees paid by creditors that fund its originations (*i.e.,* ''creditor-paid'' compensation) and pays its individual loan originators commissions and annual bonuses. The loan originator organization must retain a copy of the agreement with any creditor that pays the loan originator organization compensation for originating loans and documentation evidencing the specific payment it receives from the creditor for each loan originated. In addition, the loan originator organization must retain copies of the agreements with its individual loan originators governing their commissions and their annual bonuses and records of any specific commissions and bonuses.◄

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Subpart E—Special Rules for Certain Home Mortgage Transactions

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Section 1026.36—Prohibited Acts or Practices ►*and Certain Requirements for*◄ [*in Connection with*] *Credit Secured by a Dwelling*

1. *Scope of coverage.* Section 1026.36(b) ►,◄[and] (c) ►, (h), and (i)◄ applies to closed-end consumer credit transactions secured by a consumer's principal dwelling.► Section 1026.36(h) and (i) also applies to home-equity lines of credit under § 1026.40 secured by a consumer's principal dwelling.◄ Section 1026.36(d)►,◄[and] (e)►, (f), and (g)◄ applies to closed-end consumer credit transactions secured by a dwelling. [Section 1026.36(d) and (e) applies to closed]►Closed◄-end [loans]►consumer credit transactions include transactions ◄secured by first or subordinate liens, and reverse mortgages that are not home-equity lines of credit under § 1026.40. See § 1026.36([f]►j◄) for additional restrictions on the scope of this section, and §§ 1026.1(c) and 1026.3(a) and corresponding commentary for further discussion of extensions of credit subject to Regulation Z.

* * * * *

36(a) Loan originator►*,*◄[*and*] *mortgage broker* ►*, and compensation* ◄*defined.*

1. *Meaning of loan originator.* i. *General.* ►A. ◄Section 1026.36(a) provides that a loan originator is any person who for compensation or other monetary gain ►takes an application, ◄arranges, ►offers, ◄negotiates, or otherwise obtains an extension of consumer credit for another person. [Thus,]►The term includes a person who assists a consumer in obtaining or applying for consumer credit by advising on credit terms (including rates, fees, and other costs), preparing application packages (such as a credit or pre-approval application or supporting

documentation), or collecting application and supporting information on behalf of the consumer to submit to a loan originator or creditor. A loan originator includes a person who in expectation of compensation or other monetary gain advertises or communicates to the public that such person can or will provide any of these services or activities.

B. The◄[the] term ''loan originator'' ►also◄ includes employees of a creditor as well as employees of a mortgage broker that satisfy this definition. In addition, the definition of loan originator expressly includes any creditor that satisfies the definition of loan originator but makes use of ''table funding'' by a third party. See comment 36(a)–1.ii [below] discussing table funding. Although consumers may sometimes arrange, negotiate, or otherwise obtain extensions of consumer credit on their own behalf, in such cases they do not do so for another person or for compensation or other monetary gain, and therefore are not loan originators [under this section]. ►A ''loan originator organization'' is a loan originator that is an organization such as a trust, sole proprietorship, partnership, limited liability partnership, limited partnership, limited liability company, corporation, bank, thrift, finance company, or a credit union. An ''individual loan originator'' is limited to a natural person.◄ (Under § 1026.2(a)(22), the term ''person'' means a natural person or an organization.)

ii. *Table funding.* Table funding occurs when the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, including ►, for example, ◄ drawing on a *bona fide* warehouse line of credit, or out of deposits held by the creditor. Accordingly, a table-funded transaction is consummated with the debt obligation initially payable by its terms to one person, but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation. Although § 1026.2(a)(17)(i)(B) provides that a person to whom a debt obligation is initially payable on its face generally is a creditor, § 1026.36(a)(1) provides that, solely for the purposes of § 1026.36, such a person is also considered a loan originator. [The creditor generally is not considered a loan originator unless table funding occurs.] For example, if a person closes a loan in its own name but does not fund the loan from its own resources or deposits held by it because it ►immediately ◄ assigns the loan [at]►after◄ consummation, it is considered a creditor for purposes of Regulation Z and also a loan originator for purposes of § 1026.36. However, if a person closes a loan in its own name and ►finances a consumer credit transaction from the person's own resources, including drawing on a *bona fide* warehouse line of credit or out of deposits held by the person, but does not immediately assign the loan at closing the person is not a table-funded creditor but is included in the definition of loan originator for the purposes of § 1026.36(f) and (g). Such a person◄ [draws on a *bona fide* warehouse line of credit to make the loan at consummation, it is considered]►is◄ a creditor, not a loan originator, for purposes of Regulation Z, including ►the other provisions of◄ § 1026.36.

iii. *Servicing.* [The definition of]►A◄ ''loan originator'' does not [apply to]►include◄ a loan servicer when the servicer modifies an existing loan on behalf of the current owner of the loan. ►Other than § 1026.36(b) and (c), § 1026.36◄ [The rule] applies to extensions of consumer credit ►that constitute a refinancing under § 1026.20(a). Thus, other than § 1026.36(b) and (c), § 1026.36◄[and] does not apply if a ►person renegotiates,◄ modifies►, replaces, or subordinates◄[of] an existing obligation's terms [does not constitute]►, unless the transaction is◄ a refinancing under § 1026.20(a).

►iv. *Real estate brokerage.* A ''loan originator'' does not include a person that performs only real estate brokerage activities (*e.g.,* does not perform mortgage broker activities or extend consumer credit) if the person is licensed or registered under applicable State law governing real estate brokerage, unless such person is paid by a creditor or a loan originator for a particular consumer credit transaction subject to § 1026.36. A person is not paid by a creditor or a loan originator if the person is paid by a creditor or a loan originator on behalf of a consumer solely for performing real estate brokerage activities.

v. *Seller financing by natural persons.* The definition of ''loan originator'' does not include a natural person, estate, or trust that finances the sale of three or fewer properties in any 12-month period owned by such natural person, estate, or trust where each property serves as a security for the credit transaction. The natural person, estate, or trust also must not have constructed or acted as a contractor for the construction of the dwelling in its ordinary course of business. The natural person, estate, or trust must additionally determine in good faith and document that the buyer has a reasonable ability to repay the credit transaction. The natural person, estate, or trust makes such a good faith determination by complying with the requirements of § 1026.43. The credit transaction also must be fully amortizing, have a fixed rate or an adjustable rate that adjusts only after five or more years, and be subject to reasonable annual and lifetime limitations on interest rate increases.◄

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4. *Managers and administrative staff.* For purposes of § 1026.36, managers, administrative ►and clerical◄ staff, and similar individuals who are employed by a creditor or loan originator but do not arrange, negotiate, or otherwise obtain an extension of credit for a consumer, or whose compensation is not based on whether any particular loan is originated, are not loan originators. ►A ''producing manager'' who also arranges, negotiates, or otherwise obtains an extension of consumer credit for another person, is a loan originator. Thus, a producing manager's compensation is subject to the restrictions of § 1026.36.

5. *Compensation*— i. *General.* For purposes of § 1026.36, compensation is defined in § 1026.36(a)(3) as salaries, commissions, and any financial or similar incentive provided to a person for engaging in loan originator activities. See comment 36(d)(1)–2 for examples of types of compensation that are covered by § 1026.36(d) and (e), and comment 36(d)(1)–3 for examples of types of compensation that are not covered by § 1026.36(d) and (e). For example, the term ''compensation'' includes:

A. An annual or other periodic bonus; or

B. Awards of merchandise, services, trips, or similar prizes.

ii. *Name of fee.* Compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. For example, if a loan originator imposes a ''processing fee'' in connection with the transaction and retains such fee, it is deemed compensation for purposes of § 1026.36(d) and (e), whether the originator expends the time to process the consumer's application or uses the fee for other expenses, such as overhead.

iii. *Amounts for third-party charges.* Compensation includes amounts the loan originator retains, but does not include amounts the originator receives as payment for bona fide and reasonable charges, such as credit reports, where those amounts are passed on to a third

party that is not the creditor, its affiliate, or the affiliate of the loan originator. In some cases, amounts received for payment for such third-party charges may exceed the actual charge because, for example, the originator cannot determine with accuracy what the actual charge will be before consummation. In such a case, the difference retained by the originator is not deemed compensation if the third-party charge imposed on the consumer or collected from a person other than the consumer was bona fide and reasonable, and also complies with State and other applicable law. On the other hand, if the originator marks up a third-party charge (a practice known as ''upcharging''), and the originator retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36(d) and (e). For example:

A. Assume a loan originator receives compensation directly from either a consumer or a creditor. Further assume the loan originator uses average charge pricing under Regulation X to charge the consumer $25 for a credit report provided by a third party that is not the creditor, its affiliate or the affiliate of the loan originator. At the time the loan originator imposes the credit report fee on the consumer, the loan originator is uncertain of the cost of the credit report because the cost of a credit report from the consumer reporting agency is paid in a monthly bill and varies from between $15 and $35 depending on how many credit reports the originator obtains that month. Assume the $25 for the credit report is paid by the consumer or is paid by the creditor with proceeds from a rebate. Later, at the end of the month, the cost for the credit report is determined to be $15 for this consumer's transaction. In this case, the $10 difference between the $25 credit report fee imposed on the consumer and the actual $15 cost for the credit report is not deemed compensation for purposes of § 1026.36(d) and (e), even though the $10 is retained by the loan originator.

B. Using the same example in comment 36(a)–5.iii.A above, the $10 difference would be compensation for purposes of § 1026.36(d) and (e) if the price for a credit report varies between $10 and $15.

iv. *Returns on equity interests and dividends on equity holdings.* The term ''compensation'' for purposes of § 1026.36(d) and (e) also includes, for example, stocks and stock options, and equity interests that are awarded to individual loan originators. Thus, the awarding of stocks or stock options, or equity interests to individual loan originators is subject to the restrictions in § 1026.36(d) and (e). For example, a person may not award additional stock or a preferable type of equity interest to an individual loan originator based on the terms of a consumer credit transaction subject to § 1026.36(d) and (e) originated by that individual loan originator. However, bona fide returns or dividends paid on stocks or other equity holdings, including those paid to owners or shareholders of an loan originator organization who own such stock or equity interests, are not considered compensation for purposes of § 1026.36(d) and (e). Bona fide returns or dividends are those returns and dividends that are paid pursuant to documented ownership or equity interests and are not functionally equivalent to compensation. Ownership and equity interests must be bona fide. Bona fide ownership and equity interests are allocated according to a loan originator's respective capital contribution and the allocation is not a mere subterfuge for the payment of compensation based on terms of a transaction. For example, assume that three individual loan originators form a loan originator organization that is a limited liability company (LLC). The three individual loan originators are members of the LLC, and the LLC agreement governing the loan originator organization's structure calls for regular distributions based on the members' respective equity interests. If the members' respective equity interests are allocated based on the members' transaction terms, rather than according to their respective capital contributions, then distributions based on such equity interests are not bona fide and, thus, are considered compensation for purposes of § 1026.36(d) and (e).◄

* * * * *

36(d) Prohibited payments to loan originators.

1. *Persons covered.* Section 1026.36(d) prohibits any person (including the creditor) from paying compensation to a loan originator in connection with a covered credit transaction, if the amount of the payment is based on any of the transaction's terms**[**or conditions**]**. For example, a person that purchases a loan from the creditor may not compensate the loan originator in a manner that violates § 1026.36(d).

* * * * *

*36(d)(1) Payments based on transaction terms**[**and conditions**]**.*

1. ►*Compensation that is ''based on'' transaction terms.* i. Whether compensation is ''based on'' transaction terms does not require a determination that any person subjectively intended that there be a relationship between the amount of the compensation paid and a transaction term. Instead, the determination is based on the objective facts and circumstances indicating that compensation would have been different if a transaction term had been different. In general, this determination is based on a comparison of transactions originated, but a violation does not require a comparison of multiple transactions.

ii. The prohibition on payment and receipt of compensation based on transaction ''terms'' under § 1026.36(d)(1)(i) encompasses compensation that directly or indirectly is based on the terms of a single transaction of a single individual loan originator or the terms of multiple transactions of the individual loan originator within the time period for which the compensation is paid, where such transactions are subject to § 1026.36(d). The prohibition also covers compensation in the form of a bonus or other payment under a profit-sharing plan sponsored by the person or a contribution to a qualified or non-qualified defined contribution or benefit plan in which the individual loan originator participates, if the compensation directly or indirectly is based on the terms of the transactions of multiple individual loan originators employed by the person within the time period for which the compensation is paid, although such compensation may be permissible under § 1026.36(d)(1)(iii). For further clarity on the definitions of qualified plans, profit-sharing plans, the time period in which compensation is paid, and the other terms used in this comment 36(d)(1)–1.ii, see comment 36(d)(1)–2.iii.

A. For example, assume that a creditor employs six individual loan originators and offers loans at a minimum interest rate of 6.0 percent and a maximum rate of 8.0 percent (unrelated to risk-based pricing). Assuming relatively constant loan volume and amounts of credit extended and relatively static market rates, if the individual loan originators' aggregate transactions in a given calendar year average 7.5 percent rather than 7.0 percent, creating a higher interest rate spread over the creditor's minimum acceptable rate of 6.0 percent, the creditor will generate higher amounts of interest revenue if the loans are held in portfolio and increased proceeds from secondary market purchasers if the loans are sold. Assume that the increased revenues lead to higher profits for the creditor (*i.e.,* expenses do not

increase so as to negate the effect of the higher revenues). If the creditor pays a bonus to an individual loan originator out of a bonus pool established with reference to the creditor's profitability that, all other factors being equal, is higher than the bonus would have been if the average rate of the six individual loan originators' transactions was 7.0 percent, then the bonus is indirectly related to the terms of multiple transactions of multiple loan originators. Therefore, the bonus is compensation based on the transactions' terms and is prohibited under § 1026.36(d)(1)(i), unless the conditions under § 1026.36(d)(1)(iii) are satisfied such that the compensation is permitted under that provision.

B. Assume that an individual loan originator's employment contract with a creditor guarantees a quarterly bonus in a specified amount conditioned upon the individual loan originator meeting certain performance benchmarks (*e.g.,* volume of loans monthly). A bonus paid following the satisfaction of those contractual conditions is not directly or indirectly based on the terms of multiple individual loan originators' transactions, because the creditor is obligated to pay the bonus, in the specified amount, regardless of the terms of multiple loan originators' transactions and the effect of those multiple transaction terms on the creditor's revenues and profits.◄

[*Compensation.* i. *General.* For purposes of § 1026.36(d) and (e), the term ''compensation'' includes salaries, commissions, and any financial or similar incentive provided to a loan originator that is based on any of the terms or conditions of the loan originator's transactions. See comment 36(d)(1)–3 for examples of types of compensation that are not covered by § 1026.36(d) and (e). For example, the term ''compensation'' includes:

A. An annual or other periodic bonus; or

B. Awards of merchandise, services, trips, or similar prizes.

ii. *Name of fee.* Compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. For example, if a loan originator imposes a ''processing fee'' in connection with the transaction and retains such fee, it is deemed compensation for purposes of § 1026.36(d) and (e), whether the originator expends the time to process the consumer's application or uses the fee for other expenses, such as overhead.

iii. *Amounts for third-party charges.* Compensation includes amounts the loan originator retains, but does not include amounts the originator receives as payment for *bona fide* and reasonable third-party charges, such as title insurance or appraisals. In some cases, amounts received for payment for third-party charges may exceed the actual charge because, for example, the originator cannot determine with accuracy what the actual charge will be before consummation. In such a case, the difference retained by the originator is not deemed compensation if the third-party charge imposed on the consumer was *bona fide* and reasonable, and also complies with State and other applicable law. On the other hand, if the originator marks up a third-party charge (a practice known as ''upcharging''), and the originator retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36(d) and (e). For example:

A. Assume a loan originator charges the consumer a $400 application fee that includes $50 for a credit report and $350 for an appraisal. Assume that $50 is the amount the creditor pays for the credit report. At the time the loan originator imposes the application fee on the consumer, the loan originator is uncertain of the cost of the appraisal because the originator may choose from appraisers that charge between $300 and $350 for appraisals. Later, the cost for the appraisal is determined to be $300 for this consumer's transaction. In this case, the $50 difference between the $400 application fee imposed on the consumer and the actual $350 cost for the credit report and appraisal is not deemed compensation for purposes of § 1026.36(d) and (e), even though the $50 is retained by the loan originator.

B. Using the same example in comment 36(d)(1)–1.iii.A above, the $50 difference would be compensation for purposes of § 1026.36(d) and (e) if the appraisers from whom the originator chooses charge fees between $250 and $300.]

2. *Examples of compensation that is based on transaction terms*[*or conditions*]. Section 1026.36(d)(1) ►does not prohibit compensating a loan originator differently on different transactions, provided the difference is not based on a transaction's terms or a proxy for the transaction's terms. The section◄ prohibits loan originator compensation that is based on the terms [or conditions] of the loan originator's transactions.

►i.◄ For example, the rule prohibits compensation to a loan originator for a transaction based on that transaction's interest rate, annual percentage rate, [loan-to-value ratio,] or the existence of a prepayment penalty. The rule also prohibits compensation ►to a loan originator that is◄ based on a factor that is a proxy for a transaction's terms [or conditions]. ►If the loan originator's compensation is based in whole or in part on a factor that is a proxy for a transaction's terms, then the loan originator's compensation is based on a transaction's terms. A factor (that is not itself a term of a transaction originated by the loan originator) is a proxy for the transaction's terms if the factor substantially correlates with a term or terms of the transaction and the loan originator can, directly or indirectly, add, drop, or change the factor when originating the transaction. ◄For example[,]►:

A. No proxy exists if compensation is not substantially correlated with a difference in a transaction's terms. Assume a creditor pays loan originator employees with less than three years of employment with the creditor a commission of 0.75 percent of the total loan amount, loan originator employees with three through five years of employment 1.25 percent of the loan amount, and loan originator employees with more than five years of employment 1.5 percent of the total loan amount. For this creditor, there is no substantial correlation between whether loans are originated by a loan originator with less than three years of employment, three through five years of employment, or more than five years of employment with any term of the creditor's transactions. Thus, payment of compensation in this circumstance based on tenure is not a proxy for a transaction's terms.

B. ◄[A consumer's credit score or similar representation of credit risk, such as the consumer's debt-to-income ratio, is not one of the transaction's terms conditions. To illustrate, assume that consumer A and consumer B receive loans from the same loan originator and the same creditor. Consumer A has a credit score of 650, and consumer B has a credit score of 800. Consumer A's loan has a 7 percent interest rate, and consumer B's loan has a 6½ percent interest rate, because of the consumers' different credit scores. If the creditor pays the loan originator $1,500 in compensation for consumer A's loan and $1,000 in compensation for consumer B's loan, because the creditor varies compensation payments in whole or in part with the consumer's credit score, the originator's compensation would be based on the transactions' terms.]

►Assume a creditor pays a loan originator differently based on whether a loan the person originates will be held

by the creditor in portfolio or sold by the creditor into the secondary market. The creditor holds in portfolio only loans that have a fixed interest rate and a five-year term with a final balloon payment. The creditor sells into the secondary market all other loans, which typically have a higher fixed interest rate and a thirty-year term. The creditor pays a loan originator a 1.5 percent commission for originating loans to be held in portfolio, and pays the same loan originator a 1 percent commission for originating loans that will be sold into the secondary market. Thus, whether a loan is held in portfolio or sold into the secondary market for this creditor correlates highly with whether the loan has a five-year term or a thirty-year term, which are terms of the transaction. Also, the loan originator can indirectly change the factor by steering the consumer to choose a loan destined for portfolio or for sale into the secondary market. Whether or not the loan will be held in portfolio is a factor that is a proxy for the transaction's terms.

C. Assume a loan originator organization pays its individual loan originators different commissions for loans based on the location of the home. The loan originator organization pays its individual loan originators 1 percent of the loan amount for originating refinancings in State A and 2 percent of the loan amount for originating refinancings in State B. For this organization loan originator, on average, loans for refinancings in State A have substantially lower interest rates than loans for refinancings in State B even if a loan originator, however, cannot influence whether the refinancing of a particular loan is for a home located in State A or State B. In this instance, whether a refinancing is originated in State A or State B is not a proxy for the transaction's terms.

ii. *Pooled compensation.* Where loan originators are compensated differently and they each originate loans with different terms, § 1026.36(d)(1) does not permit the pooling of compensation so that the loan originators share in that pooled compensation. For example, assume that Loan Originator A receives a commission of two percent of the amount of credit extended on each loan he or she originates and originates loans that generally have higher interest rates than the loans that Loan Originator B originates. In addition, assume Loan Originator B receives a commission of one percent of the amount of credit extended on each loan he or she originates and originates loans that generally have lower interest rates than the loans originated by Loan Originator A. The compensation to these loan originators may not be pooled so that the loan originators each share in that pooled compensation. This type of pooling is prohibited by § 1026.36(d)(1) because each loan originator is being paid based on loan terms, with each loan originator receiving compensation based on the terms of the transactions the loan originators collectively make.

iii. *Payment and distribution of compensation to loan originators.* Section 1026.36(d)(1)(i) prohibits a person from paying and a loan originator from receiving compensation that is based on any transaction terms, except as provided in § 1026.36(d)(1)(iii). Comment 36(d)(1)–1.ii clarifies that this prohibition covers the payment of compensation that directly or indirectly is based on the terms of a single transaction of that individual loan originator, the terms of multiple transactions of that individual loan originator, or the terms of multiple transactions of multiple individual loan originators employed by the person. Comment 36(d)(1)–1.ii also provides examples of when a bonus paid to an individual loan originator is and is not based on the terms of transactions of multiple individual loan originators. Section 1026.36(d)(1)(iii) provides that, notwithstanding § 1026.36(d)(1)(i), a person may make a contribution to a qualified defined contribution or benefit plan in which the individual loan originator participates, provided that the contribution is not directly or indirectly based on the terms of that individual loan originator's transactions subject to § 1026.36(d). The section also provides that, notwithstanding § 1026.36(d)(1)(i), an individual loan originator may receive, and a person may pay to an individual loan originator, compensation in the form of a bonus or other payment under a profit-sharing plan or a contribution to a non-qualified defined benefit or contribution plan even if the compensation directly or indirectly is based on the terms of the transactions subject to § 1026.36(d) of multiple individual loan originators, but only if the conditions set forth in § 1026.36(d)(1)(iii)(A) and (B) are satisfied, as applicable. Pursuant to § 1026.36(j) and comment 36–1, § 1026.36(d) applies to closed-end consumer credit transactions secured by dwellings and reverse mortgages that are not home-equity lines of credit under § 1026.40.

A. *Profit-sharing plan.* Under § 1026.36(d)(1)(iii), a profit-sharing plan is a plan sponsored and funded by a person under which the person pays an individual loan originator directly in cash, stock, or other non-deferred compensation or through deferred compensation to be distributed at retirement or another future date. The person's funding of the profit-sharing plan, and the distributions to the individual loan originators, may be determined by a fixed formula or may be at the discretion of the person (*e.g.,* the person may elect not to contribute to the profit-sharing plan in a given year). For purposes of § 1026.36(d)(1)(iii), profit-sharing plans include ''bonus plans,'' ''bonus pools,'' or ''profit pools'' from which a person pays individual loan originators employed by the person (as well as other employees, if it so elects) additional compensation based in whole or in part on the profitability of the person or the business unit within the person's organizational structure whose profitability is referenced for the compensation payment, as applicable (*i.e.,* depending on the level within the company at which the profit-sharing plan is established). For example, a creditor that pays its individual loan originators bonuses at the end of a calendar year based on the creditor's average net return on assets for the calendar year is considered a profit-sharing plan under § 1026.36(d)(1)(iii). A bonus that is paid to an individual loan originator without reference to the profitability of the person or business unit, as applicable, such as a retention payment budgeted for in advance, does not violate the prohibition on payment of compensation based on transaction terms under § 1026.36(d)(1)(i), as clarified by comment 36(d)(1)–1.ii; therefore, the provisions of § 1026.36(d)(1)(iii) do not apply (see comment 36(d)(1)–1.ii for further guidance)

B. *Contributions to defined benefit and contribution plans.* A defined benefit plan is a retirement plan in which the sponsoring person agrees to provide a certain benefit to participants based on a pre-determined formula. A defined contribution plan is an employer-sponsored retirement plan in which contributions are made to individual accounts of employees participating in the plan, and the final distribution consists solely of assets (including investment returns) that have accumulated in these individual accounts. Depending on the type of defined contribution plan, contributions may be made either by the sponsoring employer, the participating employee, or both. Defined contribution plans and defined benefit plans are either qualified or non-qualified. For guidance on the distinction between qualified and non-qualified plans and the relevance of

such distinction to the provisions of § 1026.36(d)(1)(iii), see comments 36(d)(1)–2.iii.E and –2.iii.G.

C. *Directly or indirectly based on the terms of multiple individual loan originators.* The compensation arrangements addressed in § 1026.36(d)(1)(iii) are directly or indirectly based on the terms of transactions of multiple individual loan originators when the compensation, or its amount, results from or is otherwise related to the terms of those multiple individual loan originators' transactions subject to § 1026.36(d). See comment 36(d)(1)–1.i for further guidance on when compensation is ''based on'' loan terms. See comment 36(d)(1)–1.ii for examples of when an individual loan originator's compensation is and is not based on multiple transactions of multiple individual loan originators. If a creditor does not permit its individual loan originator employees to deviate from the transaction terms established by the creditor for each consumer, such as the interest rate offered or existence of a prepayment penalty, then the creditor's payment of a bonus at the end of a calendar year to an individual loan originator under a profit-sharing plan is not directly or indirectly based on the transaction terms during that calendar year. If a loan originator organization's revenues are derived exclusively from fees paid by the creditors that fund its originations pays a bonus under a profit-sharing plan, the bonus is not directly or indirectly based on multiple individual loan originators' transaction terms because § 1026.36(d)(1)(i) precludes any person (including the creditor) from paying to a loan originator (in this case, the loan originator organization) compensation based on the terms of the loans it is purchasing.

D. *Time period for which the compensation is paid.* Under § 1026.36(d)(1)(iii), the time period for which the compensation is paid is the time period for which the individual loan originator's performance was evaluated for purposes of the compensation decision (*e.g.,* calendar year, quarter, month), whether or not the compensation is actually paid during or after the time period. For example, assume a creditor assesses the financial performance of its mortgage business on a quarterly and calendar year basis (which annual review is the basis for the creditor's income tax filings). Among the factors taken into account in assessing the financial performance of the creditor's mortgage business are the interest rate spreads over the creditor's minimum acceptable rates of the loans subject to § 1026.36(d) originated for the creditor by individual loan originators employed by the creditor during the calendar year (*i.e.,* because the rate spreads will affect the amount of interest income and secondary market sale proceeds of the mortgage business line). Following its third quarter review, the creditor decides to pay a ''pre-holiday bonus'' in early November to every individual loan originator employee in an amount equal to two percent of each employee's salary. For purposes of § 1026.36(d)(1)(iii), the compensation decision is directly or indirectly based on the terms of multiple transactions of multiple individual loan originators during the full calendar year because it took into account the terms of transactions during the first three quarters as well as projected similar transaction terms for the remainder of the calendar year.

E. *Employer contributions to qualified plans.* Section 1026.36(d)(1)(iii) permits a person to compensate an individual loan originator through making a contribution to a qualified defined contribution or defined benefit plan in which an individual loan originator employee participates, even if the compensation is directly or indirectly based on the terms of transactions subject to § 1026.36(d) of multiple individual loan originators. For purposes of § 1026.36(d)(1)(iii), qualified defined contribution and defined benefit plans (collectively, qualified plans) include 401(k) plans, employee stock ownership plans (ESOPs), profit-sharing plans, savings incentive match plans for employees (SIMPLE plans), simplified employee pensions (SEPs), and any other plans that satisfy the qualification requirements under section 401(a) of the Internal Revenue Code (IRC) and applicable terms of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001, *et seq.* For purposes of § 1026.36(d)(1)(iii), qualified plans also include tax-sheltered annuity plans under IRC section 403(b) and eligible governmental deferred compensation plans under IRC section 457(b). For example, a loan originator organization may make discretionary contributions to a qualified profit-sharing plan (*i.e.,* the loan originator organization's annual contribution is not fixed and may even be zero in a given year) in accordance with a definite formula for allocating and distributing the contribution among the plan participants, even if the discretionary contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions.

F. *Compensation based on terms of an individual loan originator's transactions.* Under both § 1026.36(d)(1)(iii), with regard to contributions made to qualified plans, and § 1026.36(d)(1)(iii)(A), with regard to compensation in the form of a bonus or other payment under a profit-sharing plan or a contribution to a non-qualified defined contribution or benefit plan, the payment of compensation to an individual loan originator may not be directly or indirectly based on the terms of that individual loan originator's transaction or transactions. Consequently, the compensation payment may not take into account, for example, that the individual loan originator's transactions subject to § 1026.36(d) during the preceding calendar year had higher interest rate spreads over the creditor's minimum acceptable rate on average than similar transactions for other individual loan originators employed by the creditor. See comment 36(d)(1)–1 for further guidance on determining whether compensation is ''based on'' transaction terms.

ALTERNATIVE 1—PARAGRAPH 2.iii.G

G. *Bonuses under profit-sharing plans; employer contributions to defined contribution and defined benefit plans other than qualified plans.* Section 1026.36(d)(1)(iii)(B)(*1*) permits compensation to an individual loan originator in the form of a bonus or other payment under a profit-sharing plan or a contribution to a defined contribution or benefit plan other than a qualified plan even if the payment or contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions subject to § 1026.36(d), if certain conditions are met. Specifically, the compensation is permitted if no more than 50 percent of the total revenues of the person (or, if applicable, the business unit within the person at which level the payment or contribution is made) are derived from the person's mortgage business during the tax year immediately preceding the tax year in which the compensation is paid.

1. Total revenues. The total revenues for purposes of the revenue test under § 1026.36(d)(1)(iii)(B)(*1*) are the revenues of the person or the business unit to which the profit-sharing plan applies, as applicable, during the tax year immediately preceding the tax year in which the compensation is paid. Under this provision, whether the revenues of the person or the business

unit are used depends on the level within the person's organizational structure at which the profit-sharing plan is established and whose profitability is referenced for purposes of payment of the compensation under the profit-sharing plan. If the profitability of a business unit is referenced for purposes of establishing the profit-sharing plan rather than the overall profits of the person, then the revenues of the business unit are used. If the profitability of the person is referenced for purposes of establishing the profit-sharing plan, however, then the total revenues of the person are used. For example, if a creditor has two separate business units, one for commercial credit transactions and one for consumer credit transactions, and the profits of the consumer credit business unit are referenced for purposes of establishing a bonus pool to pay bonuses to individual loan originators then the profit-sharing plan applies to the consumer credit business unit, and thus the total revenues of the consumer credit business unit are the total revenues used for purposes of § 1026.36(d)(1)(i)(B)(*1*). If the creditor has a single profit-sharing plan for all of its employees, however, the creditor's total revenues across all business lines are used. The total revenues for the person or the applicable business unit or division, as applicable, are those revenues during the tax year immediately preceding the tax year in which the compensation is paid. A tax year is the person's annual accounting period for keeping records and reporting income and expenses (*i.e.,* it may be a calendar year or a fiscal year depending on the person's annual accounting period). Thus, for example, if a loan originator organization at the level of the organization (rather than a lower-tier business unit) pays multiple individual loan originator employees a bonus under a profit-sharing plan in February 2013, and the loan originator organization uses a calendar year accounting period, then the total revenues used for purposes of § 1026.36(d)(1)(i)(B)(*1*) are the organization's revenues generated during 2012. Pursuant to § 1026.36(d)(1)(i)(B)(*1*), the total revenues are determined through a methodology that is consistent with generally accepted accounting principles (GAAP) and, as applicable, the reporting of the person's income for purposes of Federal tax filings or, if none, any industry call reports filed regularly by the person. Depending on the person, the industry call report to be used may be, for example, the NMLSR Mortgage Call Report or the NCUA Call Report. For example, to determine its total revenues on a calendar year basis, a Federal credit union that is exempt from paying Federal income tax uses a methodology to determine total annual revenues that reflects the income reported in the NCUA Call Reports. If the credit union does not file NCUA Call Reports, however, the credit union uses a methodology that, pursuant to § 1026.36(d)(1)(i)(B)(*1*), otherwise is consistent with GAAP and, as applicable, reflects an accurate allocation of revenues among the credit union's business units. Pursuant to § 1026.36(d)(1)(i)(B)(*1*), the revenues of the person's affiliates generally are not taken into account for purposes of the revenue test unless the profit-sharing plan applies to the affiliate, in which case the person's total revenues also include the total revenues of the affiliate. The profit-sharing plan applies to the affiliate when, for example, the funds used to pay a bonus to an individual loan originator are the same funds used to pay a bonus to employees of the affiliate.

2. Revenues derived from mortgage business. Section 1026.36(d)(1)(iii)(B)(*1*) provides that revenues derived from mortgage business are the portion of the total revenues (*see* comment 36(d)(1)–2.iii.G.*1*) that are generated through a person's transactions subject to § 1026.36(d). Pursuant to § 1026.36(j) and comment 36–1, § 1026.36(d) applies to closed-end consumer credit transactions secured by dwellings and reverse mortgages that are not home-equity lines of credit under § 1026.40. Thus, a person's revenues from its mortgage business include, for example: origination fees and interest associated with loans for purchase money or refinance purposes originated by individual loan originators employed by the person, income from servicing of loans for purchase money or refinance purposes originated by individual loan originators employed by the person, and proceeds of secondary market sales of loans for purchase money or refinance purposes originated by individual loan originators employed by the person. Revenues derived from mortgage business do not include, for example, servicing income where the loans being serviced were purchased by the person after the loans' origination by another person, or origination fees, interest, and secondary market sale proceeds associated with home-equity lines of credit, loans secured by consumers' interests in timeshare plans, or loans made primarily for business, commercial or agricultural purposes.

ALTERNATIVE 2—PARAGRAPH 2.iii.G

G. *Bonuses under profit-sharing plans; employer contributions to defined contribution and defined benefit plans other than qualified plans.* Section 1026.36(d)(1)(iii)(B)(*1*) permits compensation to an individual loan originator in the form of a bonus or other payment under a profit-sharing plan or a contribution to a defined contribution or benefit plan other than a qualified plan even if the payment or contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions subject to § 1026.36(d), if certain conditions are met. Specifically, the compensation is permitted if no more than 25 percent of the total revenues of the person (or, if applicable, the business unit within the person at which level the payment or contribution is made) are derived from the person's mortgage business during the tax year immediately preceding the tax year in which the compensation is paid.

1. Total revenues. The total revenues for purposes of the revenue test under § 1026.36(d)(1)(iii)(B)(*1*) are the revenues of the person or the business unit to which the profit-sharing plan applies, as applicable, during the tax year immediately preceding the tax year in which the compensation is paid. Under this provision, whether the revenues of the person or the business unit are used depends on the level within the person's organizational structure at which the profit-sharing plan is established and whose profitability is referenced for purposes of payment of the compensation under the profit-sharing plan. If the profitability of a business unit is referenced for purposes of establishing the profit-sharing plan rather than the overall profits of the person, then the revenues of the business unit are used. If the profitability of the person is referenced for purposes of establishing the profit-sharing plan, however, then the total revenues of the person are used. For example, if a creditor has two separate business units, one for commercial credit transactions and one for consumer credit transactions, and the profits of the consumer credit business unit are referenced for purposes of establishing a bonus pool to pay bonuses to individual loan originators then the profit-sharing plan applies to the consumer credit business unit, and thus the total revenues of the consumer credit business unit are the total revenues used for purposes of § 1026.36(d)(1)(i)(B)(*1*). If the creditor has a single profit-sharing plan for all of

its employees, however, the creditor's total revenues across all business lines are used. The total revenues for the person or the applicable business unit or division, as applicable, are those revenues during the tax year immediately preceding the tax year in which the compensation is paid. A tax year is the person's annual accounting period for keeping records and reporting income and expenses (*i.e.,* it may be a calendar year or a fiscal year depending on the person's annual accounting period). Thus, for example, if a loan originator organization at the level of the organization (rather than a lower-tier business unit) pays multiple individual loan originator employees a bonus under a profit-sharing plan in February 2013, and the loan originator organization uses a calendar year accounting period, then the total revenues used for purposes of § 1026.36(d)(1)(i)(B)(*1*) are the organization's revenues generated during 2012. Pursuant to § 1026.36(d)(1)(i)(B)(*1*), the total revenues are determined through a methodology that is consistent with generally accepted accounting principles (GAAP) and, as applicable, the reporting of the person's income for purposes of Federal tax filings or, if none, any industry call reports filed regularly by the person. Depending on the person, the industry call report to be used may be, for example, the NMLSR Mortgage Call Report or the NCUA Call Report. For example, to determine its total revenues on a calendar year basis, a Federal credit union that is exempt from paying Federal income tax uses a methodology to determine total annual revenues that reflects the income reported in the NCUA Call Reports. If the credit union does not file NCUA Call Reports, however, the credit union uses a methodology that, pursuant to § 1026.36(d)(1)(i)(B)(*1*), otherwise is consistent with GAAP and, as applicable, reflects an accurate allocation of revenues among the credit union's business units. Pursuant to § 1026.36(d)(1)(i)(B)(*1*), the revenues of the person's affiliates generally are not taken into account for purposes of the revenue test unless the profit-sharing plan applies to the affiliate, in which case the person's total revenues for purposes also include the total revenues of the affiliate. The profit-sharing plan applies to the affiliate when, for example, the funds used to pay a bonus to an individual loan originator are the same funds used to pay a bonus to employees of the affiliate.

2. Revenues derived from mortgage business. Section 1026.36(d)(1)(iii)(B)(*1*) provides that revenues derived from mortgage business are the portion of the total revenues (*see* comment 36(d)(1)–2.iii.G.*1*) that are generated through a person's transactions subject to § 1026.36(d). Pursuant to § 1026.36(j) and comment 36–1, § 1026.36(d) applies to closed-end consumer credit transactions secured by dwellings and reverse mortgages that are not home-equity lines of credit under § 1026.40. Thus, a person's revenues from its mortgage business include, for example: origination fees and interest associated with loans for purchase money or refinance purposes originated by individual loan originators employed by the person, income from servicing of loans for purchase money or refinance purposes originated by individual loan originators employed by the person, and proceeds of secondary market sales of loans for purchase money or refinance purposes originated by individual loan originators employed by the person. Revenues derived from mortgage business do not include, for example, servicing income where the loans being serviced were purchased by the person after the loans' origination by another person, or origination fees, interest, and secondary market sale proceeds associated with home-equity lines of credit, loans secured by consumers' interests in timeshare plans, or loans made primarily for business, commercial or agricultural purposes.

H. *Individual loan originators who originate five or fewer mortgage loans.* Section 1026.36(d)(1)(iii)(B)(*2*) permits compensation to an individual loan originator in the form of a bonus or other payment under a profit-sharing plan or a contribution to a defined contribution or benefit plan other than a qualified plan even if the payment or contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions subject to § 1026.36(d), if certain conditions are met. Specifically, the compensation is permitted if the individual is a loan originator (as defined in § 1026.36(a)(1)(i)) for five or fewer transactions subject to § 1026.36(d) during the 12-month period preceding the date of the decision to make the payment or contribution.

ALTERNATIVE 1—PARAGRAPHS 2.iii.H.*1* and 2.iii.I

1. For example, assume a loan originator organization employs six individual loan originators during a given calendar year. In January of the following calendar year, the loan originator organization formally determines the financial performance of its mortgage business for the prior calendar year, which takes into account the terms of all transactions subject to § 1026.36(d) of the individual loan originators employed by the person during that calendar year. Based on that determination, the loan originator organization on February 1 decides to pay bonuses to the individual loan originators out of a ''bonus pool.'' Assume that between February 1 of the prior calendar year and January 31 of the current calendar year, individual loan originators A, B, and C each were the loan originators for between three and five transactions subject to § 1026.36(d), and individual loan originators D, E, and F each were the loan originators for between 10 and 15 transactions subject to § 1026.36(d). Therefore, the loan originator organization may award the bonuses to individual loan originators A, B, and C, but the loan originator organization may not award the bonuses to individual loan originators D, E, and F unless the loan originator organization can demonstrate that its mortgage business revenues are 50 percent or less of the total revenues of the loan originator organization or the business unit to which the profit-sharing plan applies, as applicable (thereby satisfying the conditions of § 1026.36(d)(1)(iii)(B)(*1*)).

I. *Additional examples. 1.* Assume that Company A is solely engaged in the mortgage and credit card businesses. Company A generates $1 million in revenue in a given calendar year and files its income taxes on a calendar-year basis. Company A's mortgage business accounts for $150,000 in revenue (or 15 percent of the company's total revenues), while its credit card business accounts for $850,000 in revenue (or 85 percent). A bonus pool is set aside at the level of the company, rather than the individual business units. Because Company A's mortgage business accounts for less than 50 percent of its total revenues, Company A may take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation to an individual loan originator under a profit-sharing plan or making a contribution to a defined benefit or contribution plan (whether or not a qualified plan). However, the compensation cannot reflect the terms of that individual loan originator's transaction or transactions.

2. Assume that Company B is solely engaged in the mortgage and credit card businesses. Company B earns $1 million in revenue in a given calendar year, and it files its income taxes on a calendar-year basis. Company B's mortgage business accounts for $510,000 in

revenue (51 percent), and its credit card business accounts for $490,000 in revenue (49 percent). A bonus pool is set aside at the level of the company, rather than the individual business units. Because Company B's mortgage business accounts for more than the 50 percent of its total revenues, Company B may not take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation under a profit-sharing plan or making a contribution to a non-qualified defined benefit or contribution plan. The compensation may be based on the financial performance of the credit card business alone. In addition, the compensation may be based on the terms of multiple individual loan originators' transactions with regard to a contribution to a qualified plan. Further, where an individual loan originator has been the loan originator for five or fewer transactions subject to § 1026.36(d) during the 12 month period immediately preceding the decision to make the compensation payment, Company B make take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation under a profit-sharing plan or making a contribution to a defined benefit or contribution plan (whether or not a qualified plan). In all instances, however, the compensation cannot reflect the terms of that individual loan originator's transaction or transactions.◀

ALTERNATIVE 2—PARAGRAPHS 2.iii.H.*1* and 2.iii.I

1. For example, assume a loan originator organization employs six individual loan originators during a given calendar year. In January of the following calendar year, the loan originator organization formally determines the financial performance of its mortgage business for the prior calendar year, which takes into account the terms of all transactions subject to § 1026.36(d) of the individual loan originators employed by the person during that calendar year. Based on that determination, the loan originator organization on February 1 decides to pay bonuses to the individual loan originators out of a ''bonus pool.'' Assume that between February 1 of the prior calendar year and January 31 of the current calendar year, individual loan originators A, B, and C each were the loan originators for between three and five transactions subject to § 1026.36(d), and individual loan originators D, E, and F each were the loan originators for between 10 and 15 transactions subject to § 1026.36(d). Therefore, the loan originator organization may award the bonuses to individual loan originators A, B, and C, but the loan originator organization may not award the bonuses to individual loan originators D, E, and F unless the loan originator organization can demonstrate that its mortgage business revenues are 25 percent or less of the total revenues of the loan originator organization or the business unit to which the profit-sharing plan applies, as applicable (thereby satisfying the conditions of § 1026.36(d)(1)(iii)(B)(*1*)).

I. *Additional examples. 1.* Assume that Company A is solely engaged in the mortgage and credit card businesses. Company A generates $1 million in revenue in a given calendar year and files its income taxes on a calendar-year basis. Company A's mortgage business accounts for $150,000 in revenue (or 15 percent of the company's total revenues), while its credit card business accounts for $850,000 in revenue (or 85 percent). A bonus pool is set aside at the level of the company, rather than the individual business units. Because Company A's mortgage business accounts for less than 25 percent of its total revenues, Company A may take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation to an individual loan originator under a profit-sharing plan or making a contribution to a defined benefit or contribution plan (whether or not a qualified plan). However, the compensation cannot reflect the terms of that individual loan originator's transaction or transactions.

2. Assume that Company B is solely engaged in the mortgage and credit card businesses. Company B earns $1 million in revenue in a given calendar year, and it files its income taxes on a calendar-year basis. Company B's mortgage business accounts for $300,000 in revenue (30 percent), and its credit card business accounts for $700,000 in revenue (70 percent). A bonus pool is set aside at the level of the company, rather than the individual business units. Because Company B's mortgage business accounts for more than the 25 percent of its total revenues, Company B may not take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation under a profit-sharing plan or making a contribution to a non-qualified defined benefit or contribution plan. The compensation may be based on the financial performance of the credit card business alone. In addition, the compensation may be based on the terms of multiple individual loan originators' transactions with regard to a contribution to a qualified plan. Further, where an individual loan originator has been the loan originator for five or fewer transactions subject to § 1026.36(d) during the 12 month period immediately preceding the decision to make the compensation payment, Company B make take into account the terms of multiple transactions subject to § 1026.36(d) of multiple individual loan originators when paying a bonus or other compensation under a profit-sharing plan or making a contribution to a defined benefit or contribution plan (whether or not a qualified plan). In all instances, however, the compensation cannot reflect the terms of that individual loan originator's transaction or transactions.◀

3. *Examples of compensation not based on transaction terms [or conditions].* The following are only illustrative examples of compensation methods that are permissible (unless otherwise prohibited by applicable law), and not an exhaustive list. Compensation is not based on the transaction's terms **[**or conditions**]** if it is based on, for example:

i. The loan originator's overall loan volume (*i.e.,* total dollar amount of credit extended or total number of loans originated), delivered to the creditor.

ii. The long-term performance of the originator's loans.

iii. An hourly rate of pay to compensate the originator for the actual number of hours worked.

iv. Whether the consumer is an existing customer of the creditor or a new customer.

v. A payment that is fixed in advance for every loan the originator arranges for the creditor (*e.g.,* $600 for every loan arranged for the creditor, or $1,000 for the first 1,000 loans arranged and $500 for each additional loan arranged).

vi. The percentage of applications submitted by the loan originator to the creditor that results in consummated transactions.

vii. The quality of the loan originator's loan files (*e.g.,* accuracy and completeness of the loan documentation) submitted to the creditor.

viii. A legitimate business expense, such as fixed overhead costs.

ix. Compensation that is based on the amount of credit extended, as permitted by § 1026.36(d)(1)(ii). *See* comment 36(d)(1)–9 discussing compensation based on the amount of credit extended.

4. *Creditor's flexibility in setting loan terms.* Section 1026.36(d)(1) does not limit a creditor's ability to offer a higher interest rate in a transaction as a means for the consumer to finance the payment of the loan originator's compensation or other costs that the consumer would otherwise be required to pay directly (either in cash or out of the loan proceeds). Thus, ►subject to § 1026.36(d)(2)(ii),◄ a creditor may charge a higher interest rate to a consumer who will pay fewer of the costs of the transaction directly, or it may offer the consumer a lower rate if the consumer pays more of the costs directly. For example, if the consumer pays half of the transaction costs directly, a creditor may charge an interest rate of 6 percent but, if the consumer pays none of the transaction costs directly, the creditor may charge an interest rate of 6.5 percent. Section 1026.36(d)(1) also does not limit a creditor from offering or providing different loan terms to the consumer based on the creditor's assessment of the credit and other transactional risks involved. ►*But see* § 1026.36(d)(2)(ii).◄ A creditor could also offer different consumers varying interest rates that include a constant interest rate premium to recoup the loan originator's compensation through increased interest paid by the consumer (such as by adding a constant 0.25 percent to the interest rate on each loan).

5. *Effect of modification of loan terms.* Under § 1026.36(d)(1), a loan originator's compensation may not ►be◄ **[**vary**]** based on any of a credit transaction's terms. Thus, a creditor and loan originator may not agree to set the originator's compensation at a certain level and then subsequently lower it in selective cases (such as where the consumer is able to obtain a lower rate from another creditor). When the creditor offers to extend a loan with specified terms and conditions (such as the rate and points), the amount of the originator's compensation for that transaction is not subject to change (increase or decrease) based on whether different loan terms are negotiated. For example, if the creditor agrees to lower the rate that was initially offered, the new offer may not be accompanied by a reduction in the loan originator's compensation. ►Thus, while the creditor may change loan terms or pricing to match a competitor, to avoid triggering high-cost loan provisions, or for other reasons, the loan originator's compensation on that transaction may not be changed. A loan originator therefore may not agree to reduce its compensation or provide a credit to the consumer to pay a portion of the consumer's closing costs, for example, to avoid high-cost loan provisions. See comment 36(d)(1)–7 for further guidance.◄

6. *Periodic changes in loan originator compensation and transactions' terms [and conditions].* This section does not limit a creditor or other person from periodically revising the compensation it agrees to pay a loan originator. However, the revised compensation arrangement must result in payments to the loan originator that ►are not◄ **[**do not vary**]** based on the terms **[**or conditions**]** of a credit transaction. A creditor or other person might periodically review factors such as loan performance, transaction volume, as well as current market conditions for originator compensation, and prospectively revise the compensation it agrees to pay to a loan originator. For example, assume that during the first six months of the year, a creditor pays $3,000 to a particular loan originator for each loan delivered, regardless of the loan terms **[**or conditions**]**. After considering the volume of business produced by that originator, the creditor could decide that as of July 1, it will pay $3,250 for each loan delivered by that particular originator, regardless of the loan terms **[**or conditions**]**. No violation occurs even if the loans made by the creditor after July 1 generally carry a higher interest rate than loans made before that date, to reflect the higher compensation.

►7. *Unanticipated increases in non-affiliated third-party closing costs.* Notwithstanding comment 36(d)(1)–5, § 1026.36(d)(1) does not prohibit loan originators from decreasing their compensation to cover unanticipated increases in non-affiliated third-party closing costs that result in the actual amounts of such closing costs exceeding limits imposed by applicable law, provided that the creditor or the loan originator does not know or should not reasonably be expected to know the amount of any third-party closing costs in advance. An example of where the loan originator is reasonably expected to know the amount of closing costs in advance is if the loan originator allows the consumer to choose from among only three pre-approved third-party service providers.◄

[7. *Compensation received directly from the consumer.* The prohibition in § 1026.36(d)(1) does not apply to transactions in which any loan originator receives compensation directly from the consumer, in which case no other person may provide any compensation to a loan originator, directly or indirectly, in connection with that particular transaction pursuant to § 1026.36(d)(2). Payments to a loan originator made out of loan proceeds are considered compensation received directly from the consumer, while payments derived from an increased interest rate are not considered compensation received directly from the consumer. However, points paid on the loan by the consumer to the creditor are not considered payments received directly from the consumer whether they are paid in cash or out of the loan proceeds. That is, if the consumer pays origination points to the creditor and the creditor compensates the loan originator, the loan originator may not also receive compensation directly from the consumer. Compensation includes amounts retained by the loan originator, but does not include amounts the loan originator receives as payment for *bona fide* and reasonable third-party charges, such as title insurance or appraisals. *See* comment 36(d)(1)–1.**]**

8. *Record retention.* ► Creditors and loan originator organizations are subject to certain record retention requirements under § 1026.25(a), (b), and (c)(2), as applicable, in order to comply with § 1026.36(d)(1).◄ See comment►s◄ **[**25(a)–5**]** ► 25(c)(2)–1 and –2◄ for guidance on complying with the record retention requirements of § 1026.25**[**(a)**]** as they apply to § 1026.36(d)(1).

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►10. *Amount of credit extended under a reverse mortgage.* For closed-end reverse mortgage loans, the ''amount of credit extended'' for purposes of § 1036.36(d)(1) means the maximum proceeds available to the consumer under the loan.◄

36(d)(2) Payments by persons other than consumer.

►*36(d)(2)(i) Dual compensation.*◄

1. *Compensation in connection with a particular transaction.* Under § 1026.36(d)(2)►(i)(A)◄, if any loan originator receives compensation directly from a consumer in a transaction, no other person may provide any compensation to ►any◄**[**a**]** loan originator, directly or indirectly, in connection with that particular credit transaction. *See* comment ►36(d)(2)(i)–2◄**[**36(d)(1)–7**]** discussing compensation received directly from the consumer. The restrictions imposed under § 1026.36(d)(2) relate only to payments, such as commissions, that are specific to, and paid solely in connection with, the transaction in which the consumer has paid compensation directly to a loan originator. ►Section 1026.36(d)(2)(i)(C)

provides that, if a loan originator organization receives compensation directly from a consumer, the loan originator organization may provide compensation to individual loan originators and the individual loan originator may receive compensation from the loan originator organization. (*See* comment 36(a)(1)–1.i for an explanation of the use of the term ''loan originator organization'' and ''individual loan originator'' for purposes of § 1026.36(d)(2)(i)(C).)◄ For example, payments by a mortgage broker ►organization◄ [company] to an employee ►as compensation for a specific credit transaction◄ [in the form of a salary or hourly wage, which is not tied to a specific transaction,] do not violate § 1026.36(d)(2)►(i)(A)◄ even if the consumer directly pays ►the mortgage broker organization◄ [a loan originator] a fee in connection with ►that transaction◄ [a specific credit transaction]. However,[if any loan originator receives compensation directly from the consumer in connection with a specific credit transaction,] neither the mortgage broker ►organization◄[company] nor ►the◄[an] employee [of the mortgage broker company] can receive compensation from the creditor in connection with that particular credit transaction.

2. *Compensation received directly from a consumer.* ►i. Payments to a loan originator from loan proceeds are considered compensation received directly from the consumer, while payments derived from an increased interest rate are not considered compensation received directly from the consumer. However, points paid on the loan by the consumer to the creditor are not considered payments to the loan originator that are received directly from the consumer whether they are paid directly by the consumer (for example, in cash or by check) or out of the loan proceeds. That is, if the consumer pays points to the creditor and the creditor compensates the loan originator, the loan originator may not also receive compensation directly from the consumer. Compensation includes amounts retained by the loan originator, but does not include amounts the loan originator receives as payment for bona fide and reasonable third-party charges, such as credit reports. *See* comment 36(a)–5.iii.

ii. ◄[Under Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA),]►A rebate that will be applied to reduce the consumer's settlement charges, including origination fees◄[a yield spread premium] paid by a creditor to the loan originator may be characterized on the [RESPA] disclosures ►made pursuant to the Real Estate Settlement Procedures Act◄ as a ''credit.'' [that will be applied to reduce the consumer's settlement charges, including origination fees.] A [yield spread premium]►rebate◄ disclosed in this manner is not considered to be received by the loan originator directly from the consumer for purposes of § 1026.36(d)(2).

►iii. Section 1026.36(d)(2)(i)(B) provides that compensation directly from a consumer includes payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates. Compensation to a loan originator is sometimes paid on the borrower's behalf by a person other than a creditor or its affiliates, such as a non-creditor seller, home builder, home improvement contractor or real estate broker or agent. Such payments to a loan originator are considered compensation received directly from the consumer for purposes of § 1026.36(d)(2) if they are made pursuant to an agreement between the consumer and the person other than the creditor or its affiliates. State law will determine if there is an agreement between the parties. *See* § 1026.2(b)(3). The parties do not have to agree specifically that the payments will be used to pay for the loan originator's compensation, but just that the person will make a payment toward the borrower's closing costs. For example, assume that a non-creditor seller has an agreement with the borrower to pay $1,000 of the borrower's closing costs on a transaction. Any of the $1,000 that is used to pay compensation to a loan originator is deemed to be compensation received directly from the consumer, even if the agreement does not specify that some or all of $1,000 must be used to compensate the loan originator.

36(d)(2)(ii) Restrictions on Discount Points and Origination Points or Fees.

1. *Scope.* i. *Examples of transactions to which the restrictions on discount points and origination points or fees applies.* The prohibition in § 1026.36(d)(2)(ii) applies when:

A. For transactions that do not involve a loan originator organization, the creditor pays compensation in connection with the transaction (*e.g.,* a commission) to individual loan originators that work for the creditor;

B. The creditor pays a loan originator organization compensation in connection with a transaction, regardless of how the loan originator organization pays compensation to individual loan originators that work for the organization; and

C. The loan originator organization receives compensation directly from the consumer in a transaction and the loan originator organization pays individual loan originators that work for the organization compensation in connection with the transaction.

ii. *Examples of transactions to which the restrictions on discount points and origination points or fees does not apply.* The prohibition in § 1026.36(d)(2)(ii) does not apply when:

A. For transactions that do not involve a loan originator organization, the creditor pays individual loan originators that work for the creditor only in the form of a salary, hourly wage, or other compensation that is not tied to the particular transaction; and

B. For transactions that involve a loan origination organization, the loan originator organization receives compensation directly from the consumer and pays individual loan originators that work for the organization only in the form of a salary, hourly wage, or other compensation that is not tied to the particular transaction.

iii. *Relationship to provisions prohibiting dual compensation.* Section 1026.36(d)(2)(ii) does not override any of the prohibitions on dual compensation set forth in § 1026.36(d)(2)(i). For example, § 1026.36(d)(2)(ii) does not permit a loan originator organization to receive compensation in connection with a transaction both from a consumer and from a person other than the consumer.

2. *Record retention.* See § 1026.25(c)(3) for record retention requirements as they apply to § 1026.36(d)(2)(ii).

3. *Affiliates.* Section 1026.36(d)(3) provides that for purposes of § 1026.36(d), affiliates must be treated as a single person. Thus, under § 1026.36(d)(2)(ii)(A), neither a creditor's affiliate nor an affiliate of the loan originator organization may impose on the consumer any discount points and origination points or fees in connection with the transaction unless the creditor makes available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. In addition, for purposes of the definition of discount points and origination points or fees set forth in § 1026.36(d)(2)(ii)(B), charges that are payable by a consumer to a creditor's affiliate or the affiliate of a loan originator organization are deemed to be payable to the creditor or loan originator organization, respectively.

Paragraph 36(d)(2)(ii)(A)

1. *Make available.* i. Unless a creditor determines that a consumer is unlikely to qualify for a comparable, alternative loan that does not include discount points and origination points or fees, the creditor must make such a loan available to the consumer. For transactions that do not involve a loan originator organization, a creditor will be deemed to have made available to the consumer such a loan if:

A. Any time the creditor provides any oral or written estimate of the interest rate, the regular periodic payments, the total amount of discount points and origination points or fees, or the total amount of closing costs specific to a consumer for a transaction that includes discount points and origination points or fees, the creditor also provides an estimate of those same types of information for a comparable, alternative loan that does not include discount points and origination points or fees, unless a creditor determines that a consumer is unlikely to qualify for such a loan. A creditor using this safe harbor is required to provide the estimate for the loan that does not include discount points and origination points or fees only if the estimate for the loan that includes discount points and origination points or fees is received by the consumer prior to the estimated disclosures required within three business days after application pursuant to the Bureau's regulations implementing the Real Estate Settlement Procedures Act (RESPA);

B. A creditor using the safe harbor described in comment 36(d)(1)(ii)–1.i.A is required to provide information about the loan that does not include discount points and origination points or fees only when the information about the loan that includes discount points or origination points or fees is specific to the consumer. Advertisements are not subject to this requirement. *See* comment 2(a)(2)–1.ii.A. If the information about the loan that includes discount points and origination points or fees is an advertisement under § 1026.24, the creditor using this safe harbor is not required to provide the quote for the loan that does not include discount points and origination points or fees. For example, if prior to the consumer submitting an application, the creditor provides a consumer an estimated interest rate and monthly payment for a loan that includes discount points and origination points or fees, and the estimates were based on the estimated loan amount and the consumer's estimated credit score, then the creditor must also disclose the estimated interest rate and estimated monthly payment for the loan that does not include discount points and origination points or fees. In contrast, if the creditor provides the consumer with a preprinted list of available rates for different loan products that include discount points and origination points or fees, the creditor is not required to provide the information about the loans that do not include discount points and origination points or fees under this safe harbor.

C. For purposes of § 1026.36(d)(2)(ii)(A) and this comment, ''comparable, alternative loan'' means that the two loans for which estimates are provided as discussed in comment 36(d)(2)(ii)(A)–1.i.A have the same terms and conditions, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such the amount of regular periodic payments), and the amount of any discount points and origination points or fees. If a creditor determines that the consumer is unlikely to qualify for such a loan that does not include discount points and origination points or fees, the creditor is not required to make the loan available to the consumer.

D. A creditor using this safe harbor must provide the estimate for the loan that does not include discount points and origination points or fees in the same manner (*i.e.,* either orally or in writing) as provided for the loan that does include discount points and origination points or fees. For both written and oral estimates, both of the written (or both of the oral) estimates must be given at the same time.

E. A creditor using this safe harbor must disclose estimates of the interest rate, regular periodic payments, the total amount of the discount points and origination points or fees, and the total amount of the closing costs for the loan that does not include discount points and origination points or fees only if the creditor disclosed estimates for those types of information for the loan that includes discount points and origination points or fees. For example, if a creditor provides estimates of the interest rate and monthly payments for a loan that includes discount points and origination points or fees, the creditor using the safe harbor must provide estimates of the interest rate and monthly payments for the loan that does not include discount points and origination points or fees, such as saying ''your estimated interest rate and monthly payments on this loan product where you will not pay discount points and origination points or fees to the creditor or its affiliates is [x] percent, and $[x] per month.'' On the other hand, if the creditor provides an estimate of only the interest rate for the loan that includes discount points and origination points or fees and does not provide an estimate of the regular periodic payments for that loan, the creditor using the safe harbor is required only to provide an estimate of the interest rate for the loan that does not include discount points and origination points or fees and is not required to provide an estimate of the regular periodic payments for the loan that does not include discount points and origination points or fees.

ii. For transactions that include a loan originator organization, a creditor will be deemed to have made available to the consumer a comparable, alternative loan that does not include discount points and origination points or fees if the creditor communicates to the loan originator organization the pricing for all loans that do not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan.

2. *Transactions for which the consumer is unlikely to qualify.* Under § 1026.36(d)(2)(ii)(A), a creditor or loan originator organization may not impose any discount points and origination points or fees on a consumer in a transaction unless the creditor makes available a comparable, alternative loan that does not include discount points and origination points or fees, unless the consumer is unlikely to qualify for such a loan. The creditor must have a good-faith belief that a consumer is unlikely to qualify for a loan that has the same terms and conditions as the loan that includes discount points and origination points or fees, other than the interest rate, any terms that change solely as a result of the change in the interest rate (such the amount of regular periodic payments), and the fact that the consumer will not pay discount points and origination points or fees. The creditor's belief that the consumer is unlikely to qualify for such a loan must be based on the creditor's current pricing and underwriting policy. In making this determination, the creditor may rely on information provided by the consumer, even if it subsequently is determined to be inaccurate.

3. *Loan with no discount points and origination points or fees.* In some cases, the creditor's pricing policy may not contain an interest rate for which the consumer will neither pay discount points and origination points or fees nor receive a rebate. For example, assume that a creditor's pricing policy provides interest rates only in ⅛ percent increments. Assume also that, under the

creditor's current pricing policy, the pricing available to a consumer for a particular loan product would be for the consumer to pay a 5.0 percent interest rate with .25 discount point, pay a 5.125 percent interest rate and receive .25 point in rebate, or pay a 5.250 percent interest rate and receive a 1.0 point in rebate. This creditor's pricing policy does not contain a rate for this particular loan product where the consumer would neither pay discount points and origination points or fees nor receive a rebate from the creditor. In such cases, the interest rate for a loan that does not include discount points and origination points or fees would be the interest rate for which the consumer does not pay discount points and origination points or fees and would receive the smallest possible amount of rebate from the creditor. Thus, in the example above, the interest rate for that particular loan product that does not include discount points and origination points or fees is the 5.125 percent rate with .25 point in rebate.

4. *Regular periodic payments.* For purposes of comments 36(d)(2)(ii)(A)–1 and –2, the regular periodic payments are the payments of principal and interest (or interest only, depending on the loan features) specified under the terms of the loan contract that are due from the consumer for two or more unit periods in succession.

Paragraph 36(d)(2)(ii)(B)

1. *Finance charge.* Under § 1026.36(d)(2)(ii)(B), the term discount points and origination points or fees generally includes all items that would be included in the finance charge under § 1026.4(a) and (b) as well as fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2). For purposes of § 1026.36(d)(2)(ii)(B), ''items included in the finance charge under § 1026.4(a) and (b)'' means those items included under § 1026.4(a) and (b), without reference to any other provisions of § 1026.4. Nonetheless, § 1026.36(d)(2)(ii)(B)(*3*) specifies that items that are excluded from the finance charge under § 1026.4(c)(5), (c)(7)(v), and (d)(2) are also excluded from the definition of discount points and origination points or fees. For example, property insurance premiums may be excluded from the finance charge if the conditions set forth in § 1026.4(d)(2) are met, and these premiums also may be excluded even though they are escrowed. *See* § 1026.4(c)(7)(v), (d)(2). Under § 1026.36(d)(2)(ii)(B)(*3*), these premiums also are excluded from the definition of discount points and origination points or fees. In addition, charges in connection with transactions that are payable in a comparable cash transaction are not included in the finance charge. *See* comment 4(a)–1. For example, property taxes imposed to record the deed evidencing transfer from the seller to the buyer of title to the property are not included in the finance charge because they would be paid even if no credit were extended to finance the purchase. Thus, these charges are not included in the definition of discount points and origination points or fees.

2. *Amounts for third-party charges.* Section 1026.36(d)(2)(ii)(B) generally includes any fees described in § 1026.4(a)(2) notwithstanding that those fees may not be included in the finance charge under § 1026.4(a)(2). Section 1026.36(d)(2)(ii)(B)(*2*) excludes from the definition of discount points and origination points or fees any bona fide and reasonable third-party charges not retained by the creditor or loan originator organization. Section 1026.4(a)(2) discusses fees charged by a ''third party'' that conducts the loan closing. For purposes of § 1026.4(a)(2), the term ''third party'' includes affiliates of the creditor or the loan originator organization. Nonetheless, for purposes of the definition of discount points and origination points or fees, the term ''third party'' does not include affiliates of the creditor or the loan originator. Specifically, § 1026.36(d)(3) provides that for purposes of § 1026.36(d), affiliates must be treated as a single person. Thus, under § 1026.36(d), affiliates of the creditor or the loan originator are not considered third parties. As a result, fees described in § 1026.4(a)(2) would be included in the definition of discount points and origination points or fees if they are charged by affiliates of the creditor or the loan originator. Nonetheless, fees described in § 1026.4(a)(2) would not be included in such definition if they are charged by a third party that is not an affiliate of the creditor or any loan originator organization, pursuant to the exception in § 1026.36(d)(2)(ii)(B)(*2*). In some cases, amounts received by the creditor or loan originator organization for payment of independent third-party charges may exceed the actual charge because, for example, the creditor or loan originator organization cannot determine with accuracy what the actual charge will be before consummation. In such a case, the difference retained by the creditor or loan originator organization is not deemed to fall within the definition of discount points and origination points or fees if the third-party charge imposed on the consumer was bona fide and reasonable, and also complies with State and other applicable law. On the other hand, if the creditor or loan originator organization marks up a third-party charge (a practice known as ''upcharging''), and the creditor or loan originator organization retains the difference between the actual charge and the marked-up charge, the amount retained falls within the definition of discount points and origination points or fees. For example:

i. Assume a creditor charges the consumer a $400 application fee that includes $50 for a credit report and $350 for an appraisal that will be conducted by a third party that is not the affiliate of the creditor or the loan originator organization. Assume that $50 is the amount the creditor pays for the credit report to a third party that is not affiliated with the creditor or with the loan originator organization. At the time the creditor imposes the application fee on the consumer, the creditor is uncertain of the cost of the appraisal because the appraiser charges between $300 and $350 for appraisals. Later, the cost for the appraisal is determined to be $300 for this consumer's transaction. Assume, however, that the creditor uses average charge pricing in accordance with Regulation X. In this case, the $50 difference between the $400 application fee imposed on the consumer and the actual $350 cost for the credit report and appraisal is not deemed to fall within the definition of discount points and origination points or fees, even though the $50 is retained by the creditor.

ii. Using the same example as in comment 36(d)(2)(ii)(B)–2.i above, the $50 difference would fall within the definition of discount points and origination points or fees if the appraiser charge fees between $250 and $300.

3. *Information about whether point or fee will be paid to a creditor's affiliate or affiliate of the loan originator organization.* If at the time a creditor must comply with the requirements in § 1026.36(d)(2)(ii) the creditor does not know whether a particular origination point or fee will be paid to its affiliate or an affiliate of the loan originator organization or will be paid to a third-party that is not the creditor's affiliate or an affiliate of the loan originator organization, the creditor must assume that those origination points or fees will be paid to its affiliates or an affiliate of the loan originator organization, as applicable, for purposes of complying with the requirements in § 1026.36(d)(2)(ii). For example, assume that a creditor typically uses three title

insurance companies, one of which is an affiliate of the creditor and two are not affiliated with the creditor or the loan originator organization. If the creditor does not know at the time it must establish available credit terms for a particular consumer pursuant to § 1026.36(d)(2)(ii) whether the title insurance services will be performed by the affiliate of the creditor, the creditor must assume that the title insurance services will be conducted by the affiliate for purposes of complying with the requirements in § 1026.36(d)(2)(ii).

4. *Payable to a creditor or loan originator organization.* For purposes of § 1026.36(d)(2)(ii)(B), the phrase ''payable at or before consummation by the consumer to a creditor or a loan originator organization'' includes amounts paid by the consumer in cash at or before closing or financed as part of the transaction and paid out of the loan proceeds.◄

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36(e) Prohibition on Steering.

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36(e)(3) Loan Options Presented.

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3. *Lowest interest rate.* To qualify under the safe harbor in § 1026.36(e)(2), for each type of transaction in which the consumer has expressed an interest, the loan originator must present the consumer with loan options that meet the criteria in § 1026.36(e)(3)(i). The criteria are: The loan with the lowest interest rate; the loan with the lowest total dollar amount ►of◄ **[**for**]** discount points and origination points or fees; and a loan with the lowest interest rate without negative amortization, a prepayment penalty, a balloon payment in the first seven years of the loan term, shared equity, or shared appreciation, or, in the case of a reverse mortgage, a loan without a prepayment penalty, shared equity, or shared appreciation. ►The loan with the lowest interest rate for which the consumer likely qualifies is the loan with the lowest rate the consumer can likely obtain, regardless of how many discount points the consumer must pay to obtain it.◄ To identify the loan with the lowest interest rate, for any loan that has an initial rate that is fixed for at least five years, the loan originator shall use the initial rate that would be in effect at consummation. For a loan with an initial rate that is not fixed for at least five years:

i. If the interest rate varies based on changes to an index, the originator shall use the fully-indexed rate that would be in effect at consummation without regard to any initial discount or premium.

ii. For a step-rate loan, the originator shall use the highest rate that would apply during the first five years.

* * * * *

►36(f) Loan Originator Qualification Requirements.

1. *Scope.* Section 1026.36(f) sets forth qualification requirements that a loan originator must meet. As provided in § 1026.36(a)(1) and accompanying commentary, the term loan originator includes creditors for purposes of the qualification requirements in § 1026.36(f).

2. *Licensing and registration requirements.* Section 1026.36(f) requires loan originators to comply with State and Federal licensing and registration requirements, including any such requirements imposed by the SAFE Act and its implementing regulations and State laws. SAFE Act licensing and registration applies to individual loan originators, but many State licensing and registration requirements apply to organizations as well. Section 1026.36(f) does not affect who must comply with these licensing and registration requirements. For example, the fact that the definition of loan originator in § 1026.36(a)(1) differs somewhat from that in the SAFE Act does not affect who must comply with the SAFE Act.

Paragraph 36(f)(1).

1. *Legal existence and foreign qualification.* Section 1026.36(f)(1) requires a loan originator organization to comply with State law requirements governing the legal existence and foreign qualification of the loan originator organization. Covered State law requirements include those that must be complied with to bring the loan originator organization into legal existence, to maintain its legal existence, to be permitted to transact business in another State, or facilitate service of process. For example, covered State law requirements include those for incorporation or other type of legal formation and for designating and maintaining a registered agent for service of process. State law requirements to pay taxes and other requirements that do not relate to legal accountability of the loan originator organization to consumers are outside the scope of § 1026.36(f)(1).

Paragraph 36(f)(2).

1. *License or registration.* Section 1026.36(f)(2) requires the loan originator organization to ensure that its individual loan originators are licensed or registered in compliance with the SAFE Act. A loan originator organization can meet this duty by confirming the registration or license status of an individual at *www.nmlsconsumeraccess.org*.

Paragraph 36(f)(3).

1. *Unlicensed individual loan originators.* Section 1026.36(f)(3) sets forth actions that a loan originator organization must take for any of its individual loan originators who are not required to be licensed, and are not licensed, pursuant to the SAFE Act. Individual loan originators who are not subject to SAFE Act licensing generally include employees of depository institutions and their Federally regulated subsidiaries and employees of bona fide non-profit organizations that a State has exempted from licensing under the criteria in 12 CFR 1008.103(e)(7).

Paragraph 36(f)(3)(i).

1. *Criminal and credit histories.* Section 1026.36(f)(3)(i) requires the loan originator organization to obtain, for each of its individual loan originators who is not licensed pursuant to the SAFE Act, a criminal background check, a credit report, and information related to any administrative, civil, or criminal determinations by any government jurisdiction. Loan originator organizations that do not have access to these items through the NMLSR may obtain them by other means. For example, a criminal background check may be obtained from a law enforcement agency or commercial service. A credit report may be obtained directly from a consumer reporting agency or through a commercial service. Information on any past administrative, civil, or criminal findings may be obtained from the individual loan originator.

Paragraph 36(f)(3)(ii).

1. *Scope of review.* Section 1026.36(f)(3)(ii) requires the loan originator organization to review the information that it obtains under § 1026.36(f)(3)(i) and other reasonably available information to determine whether the individual loan originator meets the standards in § 1026.36(f)(3)(ii). Other reasonably available information includes any information the loan originator organization has obtained or would obtain as part of its customary hiring and personnel management practices, including information obtained from application forms, candidate interviews, and reference checks.

Paragraph 36(f)(3)(ii)(B).

1. *Financial responsibility, character, and fitness.* The determination of financial responsibility, character, and general fitness required under § 1026.36(f)(3)(ii)(B) requires an assessment of reasonably available. A determination that an individual loan originator meets the standard complies with the requirement if it results from a reasonable assessment of information that is known to the loan originator organization or would become known to the loan originator organization as part of a reasonably prudent hiring process. Review and assessment of the individual loan originator's credit report does not require consideration of a credit score. A review and assessment of financial responsibility, character, and general fitness must consider whether the information indicates dishonesty or a pattern of irresponsible use of credit or of disregard of financial obligations. For example, conduct shown in a criminal background check may indicate dishonesty even if it did not result in a disqualifying felony conviction under § 1026.36(f)(3)(ii)(A). Irresponsible use of credit may be indicated by delinquent debts incurred as a result of extravagant spending on consumer goods but may not be shown by debts resulting from medical expenses.

Paragraph 36(f)(3)(iii).

1. *Training.* The periodic training required in § 1026.36(f)(3)(iii) must be adequate in frequency, timing, duration, and content to ensure the individual loan originator has the knowledge of State and Federal legal requirements that apply to the individual loan originator's loan origination activities. It must take into consideration the particular responsibilities of the individual loan originator and the nature and complexity of the mortgage loans with which the individual loan originator works. An individual loan originator is not required to receive training on requirements and standards that apply to types of mortgage loans the individual loan originator does not originate, or on subjects in which the individual loan originator already has the necessary knowledge and skill. Training may be delivered by the loan originator organization or any other party and may utilize workstation, Internet, teleconferencing, or other interactive technologies and delivery methods. Training that a government agency or housing finance agency has established for an individual to originate mortgage loans under a program sponsored or regulated by that a Federal, State, or other government agency or housing finance agency satisfies the requirement in § 1026.36(f)(3)(iii), to the extent that the training covers the types of loans the individual loan originator originates and applicable Federal and State laws and regulations. Training that the NMLSR has approved to meet the licensed loan originator continuing education requirement at § 1008.107(a)(2) of this chapter satisfies the requirement of § 1026.36(f)(3)(iii), to the extent that the training covers the types of loans the individual loan originator originates and applicable Federal and State laws and regulations.

36(g) NMLSR ID on Loan Documents

Paragraph 36(g)(1)

1. *NMLSR ID.* Section 1026.36(g)(1) requires a loan originator organization to include its name and NMLSR ID and the name and NMLSR ID of the individual loan originator on certain loan documents. As provided in § 1026.36(a)(1), the term loan originator does not exclude creditors for purposes this requirement. Thus, for example, if an individual loan originator employed by a bank originates a loan, the name and NMLSR ID of the individual and the bank must be included on covered loan documents. The NMLSR ID is a number generally assigned by the NMLSR to individuals registered or licensed through NMLSR to provide loan origination services. For more information, see the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) sections 1503(3) and (12) and 1504 (12 U.S.C. 5102(3) and (12) and 5103), and its implementing regulations (12 CFR 1007.103(a) and 1008.103(a)(2)). An organization may also have an NMLSR unique identifier.

2. *Loan originators without NMLSR IDs.* An NMLSR ID is not required by § 1026.36(g)(1) to be included on loan documents if the loan originator is not required to obtain and has not been issued an NMLSR ID. For example, certain loan originator organizations, and individual loan originators who are employees of bona fide non-profit organizations, may not be required to obtain a unique identifier under State law. However, some loan originators may have obtained NMLSR IDs, even if they are not required to have one for their current jobs. If a loan originator organization or an individual loan originator has been provided a unique identifier by the NMLSR, it must be included on the loan documents, regardless of whether the loan originator organization or individual loan originator is required to obtain an NMLSR unique identifier.

Paragraph 36(g)(1)(ii).

1. *Multiple individual loan originators.* If more than one individual meets the definition of a loan originator for a transaction, the NMLSR ID of the individual loan originator with primary responsibility for the transaction at the time the loan document is issued must be included. An individual loan originator may comply with the requirement in § 1026.36(g)(1)(ii), with respect to the TILA and RESPA disclosure documents, by complying with the applicable provision governing disclosure of NMLSR IDs in rules issued by the Bureau pursuant to section 1032(f) of the Dodd-Frank Act, 15 U.S.C. 5532(f).

Paragraph 36(g)(2).

1. *Amendments.* The requirements under § 1026.36(g)(2)(iv) and (v) to include the NMLSR ID on the note or other loan contract and the security instrument also apply to any amendment, rider, or addendum to the note or security instrument made at consummation.◄

Dated: August 17, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Part III

Department of Transportation

Federal Railroad Administration

49 CFR Part 270
System Safety Program; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 270

[Docket No. FRA–2011–0060, Notice No. 1]

RIN 2130–AC31

System Safety Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to require commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. An SSP would be a structured program with proactive processes and procedures developed and implemented by commuter and intercity passenger railroads to identify and mitigate or eliminate hazards and the resulting risks on each railroad's system. A railroad would have a substantial amount of flexibility to tailor an SSP to its specific operations. An SSP would be implemented by a written SSP plan and submitted to FRA for review and approval. A railroad's compliance with its SSP would be audited by FRA.

DATES: Written comments must be received by November 6, 2012. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to October 9, 2012, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2011–0060, Notice No. 1, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *www.regulations.gov.* Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC31). Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Knote, Staff Director, Passenger Rail Division, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Mail Stop 25, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 631–965–1827), *Daniel.Knote@dot.gov;* or Matthew Navarrete, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, Mail Stop 10, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–0138), *Matthew.Navarrete@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Executive Summary

This proposal would require commuter and intercity passenger railroads to develop and implement a system safety program (SSP). An SSP is a structured program with proactive processes and procedures developed and implemented by commuter and intercity passenger railroads (passenger railroads) to identify and mitigate or eliminate hazards and the resulting risks on the railroad's system. An SSP encourages a railroad and its employees to work together to proactively identify hazards and to jointly determine what, if any, action to take to mitigate or eliminate the resulting risks. The proposed rule would provide each railroad with a substantial amount of flexibility to tailor its SSP to its specific operations. FRA is proposing the SSP rule as part of its efforts to continuously improve rail safety and to satisfy the statutory mandate contained in sections 103 and 109 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, 122 Stat. 4848 *et seq.,* codified at 49 U.S.C. 20156, and 20118–20119.

Section 103 of RSIA directs the Secretary of Transportation (Secretary) to issue a regulation requiring certain railroads, including passenger railroads, to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. The proposed rule would implement this safety risk mandate for passenger railroads. Section 109 of RSIA authorizes the Secretary to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a SSP. The proposed rule would implement section 109 with respect to the system safety program covered by part 270 and a railroad safety

risk reduction rule required by FRA for Class I freight railroads and railroads with an inadequate safety performance. The Secretary has delegated the responsibility to carry out his responsibilities under both sections 103 and 109 of RSIA, as well as the general responsibility to conduct rail safety rulemakings, codified at 49 U.S.C. 20103, to the Administrator of FRA. 49 CFR 1.49(m) and (oo). The proposed SSP rule is a performance-based rule and FRA seeks comments on all aspects of the proposed rule.

An SSP would be implemented by a written system safety program plan (SSP plan). The proposed regulation sets forth various elements that a railroad's SSP plan would be required to contain to properly implement an SSP. The main components of an SSP would be the risk-based hazard management program and risk-based hazard analysis. A properly implemented risk-based hazard management program and risk-based hazard analysis would identify the hazards and resulting risks on the railroad's system, develop methods to mitigate or eliminate, if practicable, these hazards and risks, and set forth a plan to implement these methods. As part of its risk-based hazard analysis, a railroad would consider various technologies that may mitigate or eliminate the identified hazards and risks, as well as consider the role of fatigue in creating hazards and risks.

As part of its SSP plan, a railroad would also be required to describe the various procedures, processes, and programs it has in place that support the goals of the SSP. These procedures, processes, and programs include, but are not limited to, the following: a maintenance, inspection, and, repair program; rules compliance and procedures review(s); SSP employee/contractor training; and a public safety outreach program. Since most of these are procedures, processes, and programs railroads should already have in place, the railroads would most likely only have to identify and describe such procedures, processes, and programs to comply with the regulation.

An SSP can be successful only if a railroad engages in a robust assessment of the hazards and resulting risks on its system. However, a railroad may be reluctant to reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. *See* 49 U.S.C. 20119. FRA contracted with an outside organization to conduct this study and the study concluded that it was in the public interest to withhold this type of information from these types of proceedings. *See* FRA, *Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against protecting Railroad Safety Risk Reduction Program Information,* docket no. FRA–2011–0025–0031, Oct. 21, 2011, available at *http://www.fra.dot.gov/Downloads/FRA-Final-Study-Report.pdf.* Furthermore, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. 49 U.S.C. 20119(b). The proposed rule addresses the study's results and sets forth protections of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages.

An SSP will affect almost all facets of a railroad's operations. To ensure that all employees directly affected by an SSP have an opportunity to provide input on the development, implementation, and evaluation of a railroad's SSP, a railroad would be required to consult in good faith and use its best efforts to reach agreement with all of its directly affected employees on the contents of the SSP plan and amendments to the plan. In an appendix, the proposed rule provides guidance regarding what constitutes ''good faith'' and ''best efforts.''

FRA anticipates the rule would become effective 60 days after the publication of the final rule. However, by statute, the protection of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages will not become applicable until one year after the publication of the final rule. A railroad would be required to submit its SSP plan to FRA for review not more than 90 days after the applicability date of the discovery protections, i.e., 395 days after the effective date of the final rule, or not less than 90 days prior to commencing operations, whichever is later. Within 90 days of receipt of the SSP plan, or within 90 days of receipt of an SSP plan submitted prior to the commencement of railroad operations, FRA would review the plan and determine if it meets all the requirements set forth in the regulation. If, during the review, FRA determines that the railroad's SSP plan does not comply with the requirements, FRA would notify the railroad of the specific points in which the plan is deficient. The railroad would then have 60 days to correct these deficient points and resubmit the plan to FRA. Whenever a railroad amends its SSP, it would be required to submit an amended SSP plan to FRA for approval and provide a cover letter describing the amendments. A similar approval process and timeline would apply whenever a railroad amends its SSP.

A railroad's submission of its SSP plan to FRA would not be FRA's first interaction with the railroad. FRA plans on working with the railroad throughout the development of its SSP to help the railroad properly tailor the program to its specific operation. To this end, shortly after publication of the final rule, FRA would publish a guidance manual to assist a railroad in the development, implementation, and evaluation of its SSP.

Most of the passenger railroads affected by this proposal already participate in the American Public Transportation Association (APTA) System Safety Program, which also has a triennial audit program. FRA currently provides technical assistance to new passenger railroads for the development and implementation of system safety programs and conduct of preliminary hazard analyses in the design phase. Thus, the economic impact of the proposed rule is generally incremental in nature for documentation of existing information and inclusion of certain elements not already addressed by railroads in their programs. Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads, range from $1.8 million (discounted at 7%) to $2.5 million (discounted at 3%).

FRA believes that there will be new, startup, passenger railroads, that will be formed during the twenty-year analysis period. FRA is aware of two passenger railroads that intend to commence operations in the near future. FRA assumed that one of these railroads would begin developing its SSP in Year 2, and that the other would begin developing its SSP in Year 3. FRA further assumed that one additional passenger railroad would be formed and develop its SSP every other year after that, in Years 5, 7, 9, 11, 13, 15, 17 and 19. Total estimated twenty-year costs associated with implementation of the proposed rule, for startup passenger railroads, range from $270 thousand (discounted at 7%) to $437 thousand (discounted at 3%).

Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger

railroads and startup passenger railroads, range from $2.0 million (discounted at 7%) to $3.0 million (discounted at 3%).

Properly implemented SSPs are successful in optimizing the returns on railroad safety investments. Railroads can use them to proactively identify potential hazards and resulting risks at an early stage, thus minimizing associated casualties and property damage or avoiding them altogether. Railroads can also use them to identify a wide array of potential safety issues and solutions, which in turn allows them to simultaneously evaluate various alternatives for improving overall safety with available resources. This results in more cost effective investments. In addition, system safety planning helps railroads maintain safety gains over time. Without an SSP plan railroads could adopt countermeasures to safety problems that become less effective over time as the focus shifts to other issues. With SSP plans, those safety gains are likely to continue for longer time periods. SSP plans can also be instrumental in addressing casualties resulting from hazards that are not well-addressed through conventional safety programs, such as slips, trips and falls, or risks that occur because safety equipment is not used correctly, or routinely.

During the course of daily operations, hazards are continually discovered. Railroads must decide which hazards to address and how to do so with the limited resources available. Without a SSP plan in place, the decision process might become arbitrary. In the absence of the protections provided by the NPRM against discovery in legal proceedings for damages, railroads might also be reluctant to keep detailed records of known hazards. With a SSP plan in place, railroads are able to identify and implement the most cost effective measures to reduce casualties.

Railroad operations and maintenance activities have inherent safety critical elements. Thus, every capital expenditure is likely to have a safety component, whether for equipment, right-of-way, signaling or infrastructure. SSPs can increase the safety return on any investment related to the operation and maintenance of the railroad. FRA believes a very conservative estimate of all safety-related expenditures by all passenger railroads affected by the NPRM is $11.6 billion per year. In the first twenty years of the proposed rule, SSP plans can result in improved cost effectiveness of investments totaling between $92 billion (discounted at 7%) and $139 billion (discounted at 3%). Through anecdotal evidence, FRA is aware of situations where railroads unknowingly introduced hazards because they did not conduct hazard analyses. If the cost to remedy such situations is $100,000 on average and five remedies are avoided per year, railroads can save $500,000 per year and the proposed rule would be justified. FRA believes that it is reasonable to expect higher savings when considering there are 30 existing passenger rail operators impacted. The impact on the effectiveness of investments by startup railroads would likely be greater than for existing railroads, as more of their expenses are for new infrastructure or other systems that can have safety designed in from the start at little or no marginal cost.

Another way to look at the benefits that might accrue from implementing the proposed rule is based on potential accident prevention. Between 2001 and 2010, on average, passenger railroads had an average of 3,723.2 accidents, resulting in 207 fatalities, 3,543 other casualties, and $21.1 million in damage to railroad track and equipment each year. Total quantified twenty-year accident costs total between $24 billion (discounted at 7%) and $36 billion (discounted at 3%). Of course, these accidents also resulted in damage to other property, delays to both railroads and highway users, emergency response and clean-up costs, and other costs not quantified in this analysis. FRA estimated the accident reduction benefits necessary for the NPRM benefits to at least equal the implementation costs and found that a reduction of approximately 0.007% would suffice. FRA believes that such risk reduction is more than attainable.

FRA also believes that the SSP Plans will identify numerous unnecessary risks that are avoidable at no additional cost but simply through the selection of the most appropriate safety measure to address a hazard. For instance, railroads may mitigate or eliminate hazards that cause or contribute to slips, trips and falls, such as through measures that ensure the proper use of safety equipment. FRA believes that railroads will make additional investments to mitigate or eliminate many risks identified through the SSPs. FRA cannot reasonably predict the kinds of measures that may be adopted or the additional costs and benefits that will result from these. Nonetheless, FRA believes that such measures will not be undertaken unless the benefits exceed the costs and the funding is available.

In conclusion, FRA is confident that the accident reduction and cost effectiveness benefits together would justify the $2.0 million (discounted at 7%) to $3.0 million (discounted at 3%) implementation cost over the first twenty years of the proposed rule.

II. Background

III. System Safety Program—Generally

Railroads operate in a dynamic, fast-paced environment that at one time posed extreme safety risks. Through concerted efforts by railroads, labor organizations, the U.S. DOT, and many other entities, railroad safety has vastly improved. But even though FRA has issued safety regulations and guidance that address many aspects of railroad operations, gaps in safety exist, and hazards and risks may arise from these gaps. FRA believes that railroads are in an excellent position to identify some of these gaps and take the necessary action to mitigate or eliminate the arising hazards and resulting risks. Rather than prescribing the specific actions the railroads need to take, FRA believes it would be more effective to allow the railroads to use their knowledge of their unique operating environment to identify the gaps and determine the best methods to mitigate or eliminate the hazards and resulting risks. An SSP would provide a railroad with the tools to systematically and continuously evaluate its system to identify the hazards and risks that result from gaps in safety and to mitigate or eliminate these hazards and risks.

There are many programs that are similar to the SSP proposed by this part. Most notably, the Federal Aviation Administration (FAA) has published an NPRM proposing to require each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS). 75 FR 68224, Nov. 5, 2010; and 76 FR 5296, Jan. 31, 2011. An SMS ''is a comprehensive, process-oriented approach to managing safety throughout the organization.'' 75 FR 68224, Nov. 5, 2010. An SMS includes: ''an organization-wide safety policy; formal methods for identifying hazards, controlling, and continually assessing risk; and promotion of safety culture.'' *Id.* Under FAA's proposed regulation, an SMS would have four components: Safety Policy, Safety Risk Management, Safety Assurance, and Safety Promotion. *Id.* at 68225.

The U.S. Department of Defense (DoD) has also set forth guidelines for a System Safety Program. In July 1969, DoD published ''System Safety Program Plan Requirements'' (MIL–STD–882). MIL–STD–882 is DoD's standard practice for system safety, with the most recent version, MIL–STD–882E, published on May 11, 2012. DoD, *MIL–*

STD–882E, Department of Defense Standard Practice System Safety (May 11, 2012). MIL–STD–882 is used by many industries in the U.S. and internationally and certainly could be of use to a railroad when trying to determine which methods to use to comply with the proposed rule. In fact, MIL–STD–882 is cited in FRA's safety regulations for railroad passenger equipment, 49 CFR part 238, as an example of a formal safety methodology to use in complying with certain analysis requirements in that rule. *See* 49 CFR 238.103 and 238.603.

A. System Safety Program-History

i. System Safety in FRA

System safety is not a new concept to FRA. On February 20, 1996, in response to New Jersey Transit (NJT) and Maryland Rail Commuter Service accidents in early 1996, FRA issued Emergency Order No. 20, Notice No. 1 (EO 20). 61 FR 6876, Feb. 22, 1996. EO 20 required, among other things, commuter and intercity passenger railroads to promptly develop an interim system safety plan addressing the safety of operations that permit passengers to occupy the leading car in a train. In particular, EO 20 required ''railroads operating scheduled intercity or commuter rail service to conduct an analysis of their operations and file with FRA an interim safety plan indicating the manner in which risk of a collision involving a cab car is addressed.'' *Id.* at 6879. FRA intended these plans to serve as a temporary measure in the light of the passenger equipment safety standards that FRA was developing. The plans were submitted to FRA and FRA initially determined that they were inadequate. As part of the Advance Notice of Proposed Rulemaking for the passenger equipment safety standards, FRA proposed system safety program and plans for railroads. 61 FR 30672, 30684, June 17, 1996.

On June 24, 1996, the chairman of APTA's Commuter Railroad Committee sent a letter to FRA to announce that APTA commuter railroads were in compliance with the requirements of EO 20 and agreed to adopt additional safety measures, including comprehensive system safety plans. These comprehensive system safety plans were broader in scope than the interim plans had been and were modeled after the Federal Transit Administration's (FTA) part 659 system safety plans, which were being successfully used by rapid transit authorities and include a triennial audit process. *See* 49 CFR part 659. In 1997, APTA and the commuter railroads, in conjunction with FRA and the U.S. DOT, developed the Manual for the Development of System Safety Program Plans for Commuter Railroads. Pursuant to APTA's manual, the existing commuter railroads developed system safety plans, and the triennial audit process of these plans began in early 1998 with FRA's participation.

In January of 2005, in Glendale, CA, a Southern California Regional Rail Authority (Metrolink) commuter train derailed after striking an abandon vehicle left on the tracks. The derailment caused the Metrolink train to collide with the trains on both sides of it, a Union Pacific Railroad Company (UP) freight train and another Metrolink train and resulted in the death of 11 people. After this incident, FRA developed a Collision Hazard Analysis Guide to assist in conducting collision hazard assessments. The Collision Hazard Analysis Guide supports APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads by providing a ''step-by-step procedure on how to perform hazard analysis and how to develop effective mitigation strategies that will improve passenger rail safety.'' FRA, *Collision Hazard Analysis Guide: Commuter and Intercity Passenger Rail Service,* 5 (October 2007), available on FRA's Web site at *www.fra.dot.gov*. The hazard guidelines used in the Collision Hazard Analysis Guide are based on MIL–STD–882 and the hazard identification/resolution processes described in APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads.'' Id. After the publication of the Collision Hazard Analysis Guide, the commuter railroads, in conjunction with APTA, requested a meeting with FRA to discuss the implications of conducting a collision hazard analysis and having a record of such an analysis. The railroads expressed concern that to the extent the analysis revealed information about a railroad's operations that was not currently available, the information could be used against the railroad in court proceedings.

FRA has codified certain discrete aspects of system safety planning in the Passenger Train Emergency Preparedness regulations, issued in May 1998, and the Passenger Equipment Safety Standards, issued in May 1999, but comprehensive system safety planning has remained the province of the individual passenger railroads. A majority of commuter railroads still participate in the system safety program established in 1997 by APTA. The latest version of APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads was published on May 15, 2006. As mentioned previously, the Manual for the Development of System Safety Program Plans for Commuter Railroads was developed jointly with FRA, and FRA participates in the audits of the railroad's system safety plans based on this guide. From this experience, FRA has gained substantial knowledge regarding the best methods to develop, implement, and evaluate an SSP. Many components of the proposed rule are modeled after elements in APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads.

ii. Federal Transit Administration's Part 659 Program

In 1991, Congress required FTA to establish a program that required State-conducted oversight of the safety and security of rail fixed guideway systems that were not regulated by FRA. *See* Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102–240, sec. 3029, also codified at 49 U.S.C. 5330. In December 1995, FTA adopted 49 CFR part 659, Rail Fixed Guideway Systems; State Safety Oversight, which implemented Congress's mandate. 60 FR 67034, Dec. 27, 1995. In April 2005, FTA amended part 659 to incorporate the experience and insight it had gained regarding the benefits of and recommended practices for implementing State safety oversight requirements. 70 FR 22562, Apr. 29, 2005.

FTA's part 659 program applies only to rapid transit systems or portions thereof not subject to FRA's regulations. 49 CFR 659.3 and 659.5. Therefore, the requirements of FTA's part 659 would not overlap with any of the requirements proposed in this SSP regulation. However, as mentioned previously, APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads is based on FTA's part 659, so many of the elements in APTA's system safety program are based on FTA's part 659 program. FRA has always maintained a close working relationship with FTA and the implementation of the part 659 program and proposes to use many of the same concepts from the part 659 program in the SSP rule. FRA has noted where the elements in the proposed SSP rule are directly from or are based on elements from FTA's part 659.

iii. FRA's Confidential Close Call Reporting System and Clear Signal for Action Program

FRA believes that in addition to process and technology innovations, human factors-based solutions can make

a significant contribution to improving safety in the railroad industry. Based on this belief, FRA implemented the Confidential Close-Call Reporting System (C3RS). The C3RS includes: (1) Voluntary confidential reporting of close-call events by employees and root-cause-analysis problem solving by a Peer Review Team composed of labor, management, and FRA; (2) identification and implementation of corrective actions; (3) tracking the results of change; and (4) reporting the results of change to employees. Confidential reporting and joint labor-management-FRA root-cause problem solving are the most innovative of these characteristics for the railroad industry. Demonstration pilot sites for C3RS are at Union Pacific Railroad, Canadian Pacific Railway, New Jersey Transit, and Amtrak. C3RS is in the pilot stage and, currently, only implemented by two railroads providing intercity and passenger service, New Jersey Transit and Amtrak. Ranney, J. and Raslear, T., *Derailments decrease at a C3RS site at midterm,* FRA Research Results: RR12–04, April 2012, available at *http://www.fra.dot.gov/rpd/downloads/RR_Derailments_Decrease_C3RS_Site_at_Midterm_final.pdf.*

FRA also implemented the Clear Signal for Action (CSA) program, another human factors-based solution shown to improve safety. The CSA Program includes: (1) Voluntary, anonymous labor peer-to-peer feedback in the work environment on risky behaviors and conditions; (2) labor Steering Committee root cause analysis and the development of behavior and condition-related corrective actions; (3) Steering Committee implementation of behavior-related corrective actions; (4) joint labor-management Barrier Removal Team refining condition-related corrective actions and implementation; (5) tracking the results of the change; and (6) reporting the results of change to employees. Anonymous labor peer to peer feedback on risky behaviors and conditions, root cause analysis and cooperation between labor and management in corrective actions are the most innovative of these characteristics for the railroad industry. FRA considers the CSA program ready for broad implementation across the industry with three demonstration pilots completed demonstrating its applicability in diverse railroad work settings. One setting was with Amtrak baggage handlers; a second was with UP yard crews; and a third was with UP road crews. Currently FRA is funding the development of low cost program materials to aid in its distribution starting with passenger rail. Coplen, M. Ranney, J. & Zuschlag, M., *Promising Evidence of Impact on Road Safety by Changing At-risk Behavior Process at Union Pacific,* FRA Research Results: RR08–08, June 2008, available at *http://www.fra.dot.gov/downloads/Research/rr0808.pdf*; Coplen, M. Ranney, J., Wu, S. & Zuschlag, M., *Safe Practices, Operating Rule Compliance and Derailment Rates Improve at Union Pacific Yards with STEEL Process—A Risk Reduction Approach to Safety,* FRA Research Results: RR09–08, May 2009, available at *http://www.fra.dot.gov/downloads/research/rr0908Final.pdf.*

The C3RS and CSA program embody many of the concepts and principles found in an SSP: proactive identification of hazards and risks, analysis of those hazards and risks, and implementing the appropriate action to eliminate or mitigate the hazards and risks. While FRA does not intend to require any railroad to implement a C3RS or CSA program as part of their SSP, FRA does believe that these types of programs would prove useful in the development of an SSP and encourages railroads to include such programs as part of their SSP. FRA seeks comment on the extent these programs might be useful in the development of an SSP or as a component of an SSP.

B. FRA's Railroad Safety Advisory Committee

i. Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties.

An alphabetical list of RSAC members includes the following:

- American Association of Private Railroad Car Owners (AAPRCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers Association;
- Amtrak;
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers;
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- FTA;*
- Fertilizer Institute;
- High Speed Ground Transportation Association;
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers;
- Labor Council for Latin American Advancement;*
- League of Railway Industry Women;*
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women;*
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRCMA);
- National Transportation Safety Board (NTSB);*
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte;*
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association Inc.;
- Transport Canada;*
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU);
- Transportation Security Administration (TSA); and
- United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other task groups to develop facts and options on a particular aspect of a given task. The task force, or other task group, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by

a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended regulatory proposal achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. However, to the maximum extent practicable, FRA utilizes RSAC to provide consensus recommendations with respect to both proposed and final agency actions. If RSAC is unable to reach consensus on a recommendation for action, the task is withdrawn and FRA determines the best course of action.

ii. Passenger Safety Working Group

The RSAC established the Passenger Safety Working Group to handle the task of reviewing passenger equipment safety needs and programs. The Passenger Safety Working Group recommends consideration of specific actions that could be useful in advancing the safety of rail passenger service and develop recommendations for the full RSAC to consider. Members of the Passenger Safety Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company, CSX Transportation, Inc., and UP;
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Bombardier, Inc., Herzog Transit Services, Inc., Interfleet Technology, Inc. (Interfleet, formerly LDK Engineering, Inc.), Long Island Rail Road, Maryland Transit Administration, Metrolink, Metro-North Commuter Railroad Company, Northeast Illinois Regional Commuter Railroad Corporation, and Southeastern Pennsylvania Transportation Authority;
- ASLRRA;
- BLET;
- BRS;
- FTA;
- NARP;
- NTSB;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TSA;
- TWU; and
- UTU.

iii. General Passenger Safety Task Force

In 2006, the General Passenger Safety Task Force was established under the Passenger Safety Working Group to focus on door securement, passenger safety in train stations, and system safety plans. Members of the General Passenger Safety Task Force, in addition to FRA, include the following:

- AAR, including members from BNSF, CSXT, Norfolk Southern Railway Co., and UP;
- AASHTO;
- Amtrak;
- APTA, including members from Alaska Railroad Corporation, Peninsula Corridor Joint Powers Board (Caltrain), LIRR, Massachusetts Bay Commuter Railroad Company, Metro-North, MTA, NJT, New Mexico Rail Runner Express, Port Authority Trans-Hudson, SEPTA, Metrolink, and Utah Transit Authority;
- ASLRRA;
- ATDA;
- BLET;
- FTA;
- NARP;
- NRCMA;
- NTSB;
- Transport Canada; and
- UTU.

The General Passenger Safety Task Force was formed from the membership of the Passenger Safety Working Group and held its first meeting in February 2007 and the second meeting in April 2007 in conjunction with Passenger Safety Working Group. At the April 2007 meeting, the decision was made to create a System Safety Task Group to focus on the core elements and features of a system safety regulation and to draft language to recommend to the full RSAC for a system safety regulation.

iv. System Safety Task Group

The System Safety Task Group was formed from the membership of the General Passenger Safety Task Force and first met as an independent group in June 2008 in Baltimore, MD. Additional meetings were held on December 2–4, 2008 in Cambridge, MA, August 25–27, 2009 in Washington, DC, October 6–8, 2009 in Orlando, FL, March 16–17, 2010 in Washington, DC, February 1–2, 2012 in Cambridge, MA, and March 8, 2012 by teleconference. The System Safety Task Group produced recommended draft language for a system safety regulation, but work on this language was delayed until completion of the study to determine whether it was in the public interest to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any information (including a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks) compiled or collected for the purpose of evaluating, planning, or implementing a risk reduction program. *See* 49 U.S.C. 20119(a). This study was completed in October 2011 and is discussed further in the Statutory Background section of this preamble. The General Passenger Safety Task Force, including the members of the System Safety Task Group, met on February 1–2, 2012, and continued work on finalizing the language that it would recommend to the Passenger Safety Working Group. A final combined General Passenger Safety Task Force and System Safety Task Group meeting was held by teleconference on March 8, 2012.

v. RSAC Vote

On May 2, 2012, the General Passenger Safety Task Force formally voted to unanimously accept the system safety regulation language recommended by the System Safety Task Group. On May 10, 2012, the Passenger Safety Working Group voted to unanimously accept the system safety regulation language recommended by the General Passenger Safety Task Force. On May 21, 2012, the RSAC unanimously voted to accept the system safety regulation language recommended by the Passenger Safety Working Group. Thus, the Passenger Safety Working Group's recommendation was adopted by the full RSAC as a formal recommendation to FRA.

The proposed rule incorporates the majority of RSAC's recommendations. FRA decided not to incorporate certain recommendations because they were unnecessary or duplicative and their exclusion would not have a substantive effect on the rule. The proposed rule also contains elements that were not part of RSAC's recommendations. The majority of these elements are added to provide clarity and to conform with **Federal Register** formatting requirements. However, FRA will note in this NPRM the areas in which the exclusion of the RSAC recommendations or the inclusion of

elements not part of the RSAC recommendations do have a substantive effect on the rule and will provide an explanation for doing so.

IV. Statutory Background

A. The Rail Safety Improvement Act of 2008

The proposed SSP rule would implement sections 103 and 109 RSIA as they apply to railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads). *See* 49 U.S.C. 20156, 20118, and 20119. In section 103 Congress directed the Secretary to issue a regulation requiring certain railroads to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. The Secretary has delegated this responsibility to the FRA Administrator. *See* 49 CFR 1.49(oo), 74 FR 26981, Jun. 5, 2009; *see also* 49 U.S.C. 103(g). The railroads required to be subject to such a regulation include the following:

(1) Class 1 railroads;

(2) Railroad carriers with inadequate safety performance, as determined by the Secretary; and

(3) Railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads).

This proposed SSP rule would implement this railroad safety risk reduction mandate (and the other specific safety risk reduction program requirements found in section 103) for passenger railroads. The SSP rule is a risk reduction program in that it would require a passenger railroad to assess and manage risk and to develop proactive hazard management methods to promote safety improvement. The proposed rule contains provisions that, while not explicitly required by the RSIA safety risk reduction program mandate, are necessary to properly implement the mandate and are consistent with the intent behind the mandate. Further, as mentioned previously, many of the elements in the proposed rule are modeled after APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads. The majority of railroads, therefore, will have already implemented those elements. The proposed rule would also implement section 109 of the RSIA, which addresses the protection of information in railroad safety risk analyses and will be discussed later in this NPRM.

B. Related Risk Reduction Rulemaking

FRA is currently developing, also with the assistance of the RSAC, a separate risk reduction rule that would implement the requirements of sections 103 and 109 of the RSIA for Class I freight railroads and railroads with inadequate safety performance. Although passenger railroads could be subject to the requirements of this second risk reduction rule, the rule would specify that passenger railroads that are in compliance with the SSP rule be deemed in compliance with the risk reduction rule. Establishing separate safety risk reduction rules for passenger and freight railroads will allow those rules to account for the significant differences between passenger and freight operations. For example, passenger operations generate risks uniquely associated with the passengers that utilize their services. The proposed SSP rule can be specifically tailored to these types of risks, which are not independently generated by freight railroads.

C. System Safety Information Protection

Section 109 of the RSIA (codified at 49 U.S.C. 20118–20119) authorizes FRA to issue a rule protecting risk analysis information generated by railroads. These provisions would apply to information generated by passenger railroads pursuant to the proposed system safety rulemaking and to any railroad safety risk reduction programs required by FRA for Class I railroads and railroads with inadequate safety performance.

i. Exemption From Freedom of Information Act Disclosure

In section 109 of the RSIA (codified at 49 U.S.C. 20118–20119), Congress determined that for risk reduction programs to be effective, the risk analyses must be shielded from production in response to Freedom of Information Act (FOIA) requests. *See* 49 U.S.C. 20118. FOIA is a Federal statute establishing certain requirements for the public disclosure of records held by Federal agencies. *See* 5 U.S.C. 552. Generally, FOIA requires a Federal agency to make most records available upon request, unless a record is protected from mandatory disclosure by one of nine exemptions.

Section 109(a) of RSIA specifically provides that a record obtained by FRA pursuant to a provision, regulation, or order related to a risk reduction program or pilot program is exempt from disclosure under FOIA. The term ''record'' includes, but is not limited to, ''a railroad carrier's analysis of its safety risks and its statement of the mitigation measures it has identified with which to address those risks.'' *Id.* This FOIA exemption also applies to records made available to FRA for inspection or copying pursuant to a risk reduction program or pilot program.

Railroad system safety records in FRA's possession, therefore, are generally exempt from mandatory disclosure under FOIA. The RSIA, however, establishes two exceptions to this prohibition on FOIA disclosure. The first exception permits disclosure when it is necessary to enforce or carry out any Federal law. The second exception permits disclosure when a record is comprised of facts otherwise available to the public and when FRA, in its discretion, has determined that disclosure would be consistent with the confidentiality needed for a risk reduction program or pilot program.

ii. Discovery and Other Use of Risk Analysis Information in Litigation

1. The RSIA Mandate

The RSIA also addressed the disclosure and use of risk analysis information in litigation. Section 109 directed FRA to conduct a study to determine whether it was in the public interest to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any information (including a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks) compiled or collected for the purpose of evaluating, planning, or implementing a risk reduction program. *See* 49 U.S.C. 20119(a). In conducting this study, the RSIA required FRA to solicit input from railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public. *See id.* The RSIA also states that upon completion of the study, if in the public interest, FRA may prescribe a rule to address the results of the study (i.e., a rule to protect risk analysis information from disclosure during litigation). *See* 49 U.S.C. 20119(b). The RSIA prohibits any such rule from becoming effective until one year after its adoption. *See id.*

2. The Study and Its Conclusions

FRA contracted with a law firm, Baker Botts L.L.P., to conduct the study on FRA's behalf. Various documents related to the study are available for review in public docket number FRA–2011–0025, which can be accessed online at *www.regulations.gov.* As a first step, the contracted law firm prepared a comprehensive report identifying and evaluating other Federal safety programs that protect risk reduction information

from use in litigation. *See Report on Federal Safety Programs and Legal Protections for Safety-Related Information,* FRA, docket no. FRA–2011–0025–0002, April 14, 2011. Next, as required by section 109 of the RSIA, FRA published a **Federal Register** notice seeking public comment on the issue of whether it would be in the public interest to protect certain railroad risk reduction information from use in litigation. *See* 76 FR 26682, May 9, 2011. Comments received in response to this notice may be viewed in the public docket.

On October 21, 2011, the contracted law firm produced a final report on the study. *See Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against protecting Railroad Safety Risk Reduction Program Information,* FRA, docket no. FRA–2011–0025–0031, Oct. 21, 2011, available at *http://www.fra.dot.gov/Downloads/FRA-Final-Study-Report.pdf.* The final report contained analyses of other Federal programs that protect similar risk reduction data, the public comments submitted to the docket, and whether it would be in the public interest, including the interests of public safety and the legal rights of persons injured in railroad accidents, to protect railroad risk reduction information from disclosure during litigation. The final report concluded that it would be within FRA's authority and in the public interest for FRA to promulgate a regulation protecting certain risk analysis information held by the railroads from discovery and use in litigation and makes recommendations for the drafting and structuring of such a regulation. *See id.* at 63–64.

3. FRA's Proposal

In response to the final study report, this NPRM is proposing to protect any information compiled or collected solely for the purpose of developing, implementing or evaluating an SSP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. The information protected would include a railroad's identification of its safety hazards, analysis of its safety risks, and its statement of the mitigation measures with which it would address those risks and could be in the following forms: Plans, reports, documents, surveys, schedules, lists, or data. (Similar protection will be proposed for railroad safety risk reduction programs required by FRA for Class I railroads and railroads with inadequate safety performance). Additional specifics regarding this proposal will be discussed in the section-by-section analysis of this NPRM.

V. Guidance Manual

FRA has been working with railroads for many years to implement many of the principles and elements that the SSP rule contains. From this experience, FRA has learned the best practices and the pitfalls of implementing an SSP. Since each railroad operation is unique, the best practices for each railroad will be different. Therefore, rather than setting forth specific requirements that may be applicable for one railroad, but unworkable for another, FRA will set forth general requirements of a SSP in the rule and allow each railroad the flexibility to tailor those requirements to their specific operations. To this end, FRA plans on providing the railroads with a guidance manual that will assist in the development, implementation, and evaluation of their SSPs. This guidance manual (''Guide'') will provide the railroads with the most efficient and effective methods to implement their SSPs. Regarding most aspects of an SSP, a railroad will be able to refer to this Guide for assistance in implementing its SSP. FRA expects to publish the Guide shortly after the publication of the final rule in this proceeding. FTA has published a similar document regarding implementation of its part 659 program. *See* Resource Toolkit for State Oversight Agencies Implementing 49 CFR part 659 (March 2006).

VI. Section-by-Section Analysis

FRA proposes to add a new part 270 to chapter 49 of the CFR. Part 270 would satisfy the RSIA requirements regarding safety risk reduction programs for railroads providing intercity rail passenger or commuter rail passenger service. 49 U.S.C. 20156. It will also protect certain information compiled or collected pursuant to a safety risk reduction program from admission into evidence or discovery during court proceedings for damages. 49 U.S.C. 20119.

Subpart A—General

Section 270.1 Purpose and scope

Paragraph (a) states that the purpose of the proposed rule is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. The proposed rule would require a railroad to establish a program that systematically evaluates railroad safety hazards on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

Paragraph (b) states that the proposed rule prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. The proposed rule would not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

Paragraph (c) states that the proposed rule provides for the protection of information generated solely for the purpose of developing, implementing, or evaluating a system safety program under this part or a railroad safety risk reduction program required by this chapter for Class I railroads and railroads with inadequate safety performance.

Section 270.3 Application

The RSIA mandates that FRA require each railroad carrier that is a Class I railroad, a railroad carrier that has inadequate safety performance, or a railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). This proposed rule sets forth the requirements related to a railroad safety risk reduction program for a railroad that provides intercity rail passenger or commuter rail passenger transportation. Safety risk reduction programs for Class I railroads and railroads with inadequate safety performance will be addressed in the separate Risk Reduction Program rulemaking proceeding.

Paragraph (a) proposes that this rule apply to railroads that operate intercity or commuter passenger train service on the general railroad system of transportation and railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service. A public authority that indirectly provides passenger train service by contracting out the actual operation to another railroad or independent contractor would be regulated by FRA as a railroad under the provisions of the proposed rule. Although the public authority would ultimately be responsible for the development and implementation of an SSP (along with all related recordkeeping requirements), the railroad or other independent contractor that operates the authority's passenger

train service would be expected to fulfill all of the responsibilities under this part with respect to the SSP, including implementation.

FRA proposes to except certain railroads from the proposed rule's applicability. The first exception, proposed in paragraph (b)(1), covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. This paragraph is intended merely to clarify the circumstances under which rapid transit operations are not subject to FRA jurisdiction under this part. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends for part 270 to apply to those rapid transit type operations.

Paragraph (b)(2) proposes an exemption for operations commonly described as tourist, scenic, historic, or excursion service whether on or off the general railroad system. Tourist, scenic, historic, or excursion rail operations is defined by proposed § 270.5 and this exemption is consistent with FRA's other regulations concerning passenger operations. *See* 49 CFR 238.3(c)(3) and 239.3(b)(3). Further, the basis of this exemption is consistent with that underlying FRA's other regulations concerning passenger operations. *See* 63 FR 24644, May 4, 1998; 64 FR 25576, May 12, 1999.

Paragraph (b)(3) makes clear that the requirements of the proposed rule would not apply to the operation of private passenger train cars, including business or office cars and circus train cars. While FRA believes that a private passenger car operation should be held to the same basic level of safety as other passenger train operations, such operations were not specifically identified in the statutory mandate and FRA is taking into account the burden that would be imposed by requiring private passenger car owners and operators to conform to the requirements of this part. Private passenger cars are often hauled by host railroads such as Amtrak and commuter railroads, and these hosts often impose their own safety requirements on the operation of the private passenger cars. Pursuant to this proposal, these host railroads would already be required to have SSPs in place to protect the safety of their own passengers; the private car passengers would presumably benefit from these programs even without the rule directly covering private car owners or operators. In the case of non-revenue passengers, including employees and guests of railroads that are transported in business and office cars, as well as persons traveling on circus trains, the railroads would be expected to provide for their safety in accordance with existing safety operating procedures and protocols relating to normal freight train operations.

Finally, paragraph (b)(4) proposes an exception from the requirements of this part for railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 270.5). Plant railroads are typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves.

Section 103(a)(4) of RSIA allows a railroad carrier that is not required to submit a railroad safety risk reduction program to voluntarily submit such a program. 49 U.S.C. 20156(a)(4). If the railroad voluntary submits a program, it shall comply with the requirements set forth in RSIA and is subject to approval by the Secretary. *Id.* FRA anticipates that railroads who voluntarily submit a railroad safety risk reduction program under RSIA would do so pursuant to the risk reduction program regulation that is currently being developed. Proposed paragraph (a) is broad and intended to cover the majority of the railroads that provide intercity and passenger service. Absent the exceptions in paragraph (b), if a railroad is not required by this proposed part to establish an SSP, that railroad more than likely does not provide intercity or passenger service and, therefore, may be required to establish a risk reduction program. If these railroads are not required to establish a risk reduction program but decide to voluntarily establish a railroad safety risk reduction program pursuant to RSIA, the risk reduction program regulation would more than likely be better suited for their operations. FRA does not intend to prohibit railroads that are not required to establish either an SSP or risk reduction program from voluntarily establishing an SSP. FRA seeks comment on whether a provision that allows a railroad to voluntary establish an SSP should be included in the proposed SSP rule.

Section 270.5 Definitions

This proposed section contains a set of definitions that clarify the meaning of important terms as they are used in the rule. The proposed definitions are carefully worded in an attempt to minimize the potential for misinterpretation of the rule. Many of the proposed definitions are based on definitions in FTA's part 659 and APTA's system safety program. FRA requests comment and input regarding the terms defined in this section and specifically whether other terms should be defined.

''Administrator'' refers to Federal Railroad Administrator or his or her delegate.

''Configuration management'' means the process a railroad would use to ensure that the configurations of all property, equipment and system design elements are properly documented.

''FRA'' means the Federal Railroad Administration.

''Fully implemented'' means that all the elements of the railroad's SSP plan required by this part are established and applied to the safety management of the railroad. A railroad's SSP is considered ''fully implemented'' when all of the elements described in the railroad's SSP plan are properly established and effectively applied to the safety management of the railroad.

''Hazard'' means any real or potential condition, as identified in the railroad's risk-based hazard analysis under § 270.103(r), that can cause injury, illness, or death; damage to or loss of a system; or damage to equipment, property, or the environment. This definition is based on the existing definition of the term contained in FTA's part 659. 49 CFR 659.5.

''Passenger'' means a person, excluding an on-duty employee, who is on board, boarding, or alighting from a rail vehicle for the purpose of travel. This definition is modeled after the definition of ''passenger'' contained in FTA's regulations at part 659, which ''means a person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.'' 49 CFR 659.5. FRA has added the phrase ''excluding an on-duty employee'' to the proposed definition to clarify that, if a person is engaging in these activities (on board, boarding, or alighting) and they are an off-duty railroad employee, that person is considered a passenger for the purposes of this rule.

''Person'' means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

''Plant railroad'' means a type of operation that has traditionally been excluded from the application of FRA regulations because it is not part of the

general railroad system of transportation. Under § 270.3, FRA has chosen to exempt plant railroads, as defined in proposed § 270.5, from the proposed regulation. In the past, FRA has not defined the term ''plant railroad'' in other regulations that it has issued because FRA assumed that its *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, The Extent and Exercise of FRA's Safety Jurisdiction,* 49 CFR part 209, Appendix A (FRA's Policy Statement or the Policy Statement) provided sufficient clarification as to the definition of that term. However, it has come to FRA's attention that certain rail operations believed that they met the characteristics of a plant railroad, as set forth in the Policy Statement, when, in fact, their rail operations were part of the general railroad system of transportation (general system) and therefore did not meet the definition of a plant railroad. FRA would like to avoid any confusion as to what types of rail operations qualify as plant railroads. FRA would also like to save interested persons the time and effort needed to cross-reference and review FRA's Policy Statement to determine whether a certain operation qualifies as a plant railroad. Consequently, FRA has decided to define the term ''plant railroad'' in part 270.

The proposed definition would clarify that when an entity operates a locomotive to move rail cars in service for other entities, rather than solely for its own purposes or industrial processes, the services become public in nature. Such public services represent the interchange of goods, which characterizes operation on the general system. As a result, even if a plant railroad moves rail cars for entities other than itself solely on its property, the rail operations will likely be subject to FRA's safety jurisdiction because those rail operations bring plant trackage into the general system.

The proposed definition of the term ''plant railroad'' is consistent with FRA's longstanding policy that it will exercise its safety jurisdiction over a rail operation that moves rail cars for entities other than itself because those movements bring the track over which the entity is operating into the general system. *See* 49 CFR part 209, Appendix A. Indeed, FRA's Policy Statement provides that ''operations by the plant railroad indicating it [i]s moving cars on * * * trackage for other than its own purposes (*e.g.,* moving cars to neighboring industries for hire)'' brings plant track into the general system and thereby subjects it to FRA's safety jurisdiction. 49 CFR part 209, Appendix A. Additionally, this interpretation of the term ''plant railroad'' has been upheld in litigation before the U.S. Court of Appeals for the Fifth Circuit. *See Port of Shreveport-Bossier* v. *Federal Railroad Administration,* No. 10–60324 (5th Cir. 2011) (unpublished per curiam opinion).

''Positive train control system'' means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of 49 CFR part 236.

''Rail vehicle'' means railroad rolling stock, including, but not limited to, passenger and maintenance vehicles.

''Railroad'' means: (1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation; and

(2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

The definition of ''railroad'' is based upon 49 U.S.C. 20102(1) and (2), and encompasses any person providing railroad transportation directly or indirectly, including a commuter rail authority that provides railroad transportation by contracting out the operation of the railroad to another person, as well as any form of non-highway ground transportation that runs on rails or electromagnetic guideways, but excludes urban rapid transit not connected to the general system.

''Risk'' means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

''System Safety'' means the application of management and engineering principles and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of the system life cycle. By specifying that system safety operates within certain constraints, this definition is intended to clarify that there may be hazards on the railroad's system that a railroad may not be capable of fully mitigating or eliminating. Rather, the railroad would monitor the hazard and at some point, if feasible, employ methods to mitigate or eliminate that hazard and resulting risk.

The definition for ''Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation'' means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations. This definitions is consistent with FRA's other regulations concerning passenger operations. *See* 49 CFR 238.5 and 239.5.

RSAC recommended including definitions for the following terms: contractor, FTA, hazard analysis, improvement plan, individual investigation, passenger operations, passenger railroad, railroad property, risk-based hazard management, safety, safety certification, safety culture, safety-related services, safety-related employee, sponsoring railroad, system safety program, and system safety program plan. FRA determined that these definitions did not provide any additional clarity and were unnecessary. FRA seeks comments regarding whether any of these definitions or any other definitions should be added to the final rule.

Section 270.7 Waivers

This section explains the process for requesting a waiver from a provision of the proposed rule. FRA has historically entertained waiver petitions from parties affected by an FRA regulation. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general regulatory criteria is in the public interest and can be made without compromising or diminishing railroad safety.

The rules governing the FRA waiver process are found in 49 CFR part 211. In general, these rules state that after a petition for a waiver is received by FRA, a notice of the waiver request is published in the **Federal Register**, an opportunity for public comment is provided, and an opportunity for a hearing is afforded the petitioning or other interested party. After reviewing information from the petitioning party and others, FRA would grant or deny the petition. In certain circumstances,

conditions may be imposed on the grant of a waiver if FRA concludes that the conditions are necessary to assure safety or if they are in the public interest, or both.

Section 270.9 Penalties and Responsibility for Compliance

This section contains provisions regarding the proposed penalties for failure to comply with the rule and the responsibility for compliance.

Paragraph (a) identifies the civil penalties that FRA may impose upon any person that violates or causes a violation any requirement of this part. These penalties are authorized by 49 U.S.C. 20156(h), 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement would be subject to a civil penalty of at least $650 and not more than $25,000 per violation. Civil penalties may be assessed against individuals only for willful violations. Where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $105,000 per violation may be assessed. In addition, each day a violation continues constitutes a separate offense. Maximum penalties of $25,000 and $105,000 are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461, note, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, 110 Stat. 1321–373, which requires each agency to regularly adjust certain civil monetary penalties in an effort to maintain their remedial impact and promote compliance with the law. Furthermore, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved. Even though this proposed rule does not include a schedule of civil penalties, the final rule would contain such a schedule.

Proposed paragraph (b) is intended to make clear that any person, including but not limited to a railroad, contractor or subcontractor for a railroad, or a local or State governmental entity that performs any function covered by this part, must perform that function in accordance with the requirements of this part.

Subpart B—System Safety Program Requirements

Section 270.101 System Safety Program; General

This section sets forth the general requirements of the rule. Each railroad subject to part 270 (i.e., each passenger railroad) would be required to establish and fully implement an SSP that systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. The main components of a railroad's SSP would be the risk-based hazard management program and risk-based hazard analysis that would be designed to proactively identify risks and mitigate or eliminate the resulting risks from those hazards. The risk-based hazard management program and risk-based hazard analysis requirements are set forth in § 270.103(q) and (r).

To properly implement an SSP, a railroad would be required to set forth an SSP plan, as required by § 270.103. The SSP plan would be a document or a series/collection of documents that contain all of the elements required by this part. A railroad's SSP plan can reference documents and does not have to make unnecessary duplication of these documents to include in the plan. The SSP plan shall be designed to support the railroad's SSP.

Proposed paragraph (b) would require that a railroad's SSP be designed so that it promotes a positive safety culture. Safety culture may be defined as the shared values, actions and behaviors that demonstrate commitment to safety over competing goals and demands. U.S. DOT, Safety Council Research Paper, *SAFETY CULTURE: A Significant Driver Affecting Safety in Transportation* (May 2011). Research has shown that when an organization has a strong safety culture, accidents and incidents are less frequent and less severe. *Id.* Whereas, if an organization's safety culture is weak, significant and catastrophic accidents are more likely to occur. *Id.* For an SSP to achieve its goal, the mitigation or elimination of safety hazards and risks on the rail system, the railroad must have a positive and strong safety culture, so it is vital that the railroad's SSP be designed so that it promotes a positive safety culture. A railroad would have to describe its safety culture pursuant to § 270.103(c)(1) and describe how it measures the success of its safety culture pursuant to § 270.103(v).

Section 270.102 Consultation Requirements

This section proposes to implement section 103(g)(1) of RSIA, which states that a railroad required to establish an SSP must ''consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.'' 49 U.S.C. 20156(g)(1). This section would also implement section 103(g)(2) of RSIA, which further provides that if a ''railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.'' 49 U.S.C. 20156(g)(2). The RSIA requires FRA to consider these views during review and approval of a railroad's SSP plan.

RSAC did not provide recommended language for this section. Rather, FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that the language would be provided in this NPRM for review and comment. Therefore, FRA seeks comment on the approach proposed in this rule regarding the consultation requirement set forth in section 103(g) of RSIA.

Paragraph (a)(1) of this section proposes to implement section 103(g)(1) of RSIA by requiring a railroad to consult with its directly affected employees on the contents of its SSP plan. As part of that consultation, a railroad must utilize good faith and best efforts to reach agreement with its directly affected employees on the contents of its plan.

Proposed paragraph (a)(2) specifies that the term directly affected employees includes any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. This section makes it clear that a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

Proposed paragraph (a)(3) requires a railroad to meet with its directly

affected employees no later than [180 days after the effective date of the final rule] to discuss the consultation process. This meeting will be the railroad's and directly affected employee's opportunity to schedule, plan, and discuss the consultation process. FRA does not expect a railroad to discuss any substantive material until § 270.105 becomes applicable. Rather, this meeting should be more administrative in nature so that both parties understand the consultation process as they go forward and that they may engage in substantive discussions as soon as possible after the applicability date of § 270.105. This will also be an opportunity to educate the directly affected employees on system safety and how it may affect them. The railroad will be required to provide notice to the directly affected employees no less than 60 days before the meeting is scheduled.

Proposed paragraph (a)(4) directs readers to appendix B of this part for additional guidance on how a railroad might comply with the consultation requirements of this section. This appendix is discussed later in this preamble.

Paragraph (b) proposes to require a railroad to submit, together with its SSP plan, a consultation statement. The purpose of this consultation statement would be twofold: (1) To help FRA determine whether the railroad has complied with § 270.102(a) by, in good faith, consulting and using its best efforts to reach agreement with its directly affected employees on the contents of its SSP plan; and (2) to ensure that the directly affected employees with which the railroad has consulted were aware of the railroad's submission of its SSP plan to FRA for review. The consultation statement must contain specific information described in proposed paragraphs (b)(1) through (b)(4) of this section.

Paragraph (b)(1) proposes to require that the consultation statement contain a detailed description of the process the railroad utilized to consult with its directly affected employees. This description should contain information such as (but not limited to) the following: (1) How many meetings the railroad held with its directly affected employees; (2) what materials the railroad provided its directly affected employees regarding the draft SSP plan; and (3) how input from directly affected employees was received and handled during the consultation process.

If the railroad is unable to reach agreement with its directly affected employees on the contents of its SSP plan, paragraph (b)(2) proposes to require that the consultation statement identify any areas of non-agreement and provide the railroad's explanation for why it believed agreement was not reached. A railroad could specify, in this portion of the statement, whether it was able to reach agreement on the contents of its SSP plan with certain directly affected employees, but not others.

If the SSP plan would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization, paragraph (b)(3) would require the consultation statement to identify any such provision and explain how the railroad's SSP plan would affect it.

Under proposed paragraph (b)(4), the consultation statement must include a service list containing the names and contact information for the international/national president and general chairperson of any non-profit employee labor organization representing directly affected employees; any labor representative who participated in the consultation process; and any directly affected employee who significantly participated in the consultation process independently of a non-profit labor organization. This paragraph would also require a railroad (at the same time it submits its proposed SSP plan and consultation statement to FRA) to provide individuals identified in the service list a copy of the SSP plan and consultation statement. This service list would help FRA determine whether the railroad had complied with the § 270.102(a) requirement to consult with its directly affected employees. Requiring the railroad to provide individuals identified in the service list with a copy of its submitted plan and consultation statement would also notify those individuals that they now have 60 days under § 270.102(c)(2) (discussed below) to submit a statement to FRA if they are not able to come to reach agreement with the railroad on the contents of the SSP plan.

Proposed paragraph (c)(1) would implement section 103(g)(2) of RSIA by providing that, if a railroad and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, then a directly affected employee may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached. *See* 49 U.S.C. 20156(g)(2). The FRA Associate Administrator for Railroad Safety/Chief Safety Officer will consider any such views during the plan review and approval process.

Proposed paragraph (c)(2) specifies that a railroad's directly affected employees have 60 days following the railroad's submission of its proposed SSP plan to submit the statement described in paragraph (c)(1) of this section. FRA believes 60 days would provide directly affected employees sufficient time to review a railroad's proposed SSP plan and to draft and submit to FRA a statement if they were not able to come to agreement with the railroad on the contents of that plan. In order to provide directly affected employees the opportunity to submit a statement, FRA would not approve or disapprove a railroad's proposed SSP plan before the conclusion of this 60-day period.

Proposed paragraph (d) would require that a railroad's SSP plan include a description of the process the railroad will use to consult with its directly affected employees on any substantive amendments to the railroad's SSP plan. As with its initial SSP plan, a railroad must use good faith and best efforts to reach agreement with directly affected employees on any substantive amendments to that plan. Requiring a railroad to detail that process in its plan would facilitate the consultation by establishing a known path to be followed. A railroad that did not follow this process when substantively amending its SSP plan could then be subject to penalties for failing to comply with the provisions of its plan. This requirement would not apply to non-substantive amendments (e.g., amendments updating names and addresses of railroad personnel). If a railroad is uncertain as to whether a proposed amendment is substantive or non-substantive, it could contact FRA for guidance.

Section 270.103 SSP plan

As mentioned previously, a railroad would be required to create a written SSP plan to fully implement and support its SSP. Proposed § 270.103 sets forth all of the required elements of the railroad's SSP plan.

Paragraph (a) proposes that a railroad's SSP plan must contain the minimum elements set forth in § 270.103. As provided in § 270.201, a railroad's SSP plan must be submitted to and approved by the FRA Associate Administrator for Railroad Safety/Chief Safety Officer. The FRA Associate Administrator for Railroad Safety/Chief Safety Officer approval of the SSP plan would be considered approval of the railroad's SSP as required by RSIA. *See* 49 U.S.C. 20156(a)(3).

In certain scenarios, a railroad providing passenger service will not be

the railroad that owns the track on which the railroad is providing passenger service. Rather, the railroad that owns the track will be hosting the railroad that is providing the passenger train service. For a railroad providing passenger train service to effectively identify, evaluate, and manage the hazards and resulting risks on the system over which it operates as required by this part, the railroad would need to evaluate all aspects of the operation. As such, proposed paragraph (a)(2) of this section addresses the coordination that must occur between a railroad providing passenger service and a railroad hosting that passenger train service. If certain aspects of the operation are not under the control of the railroad providing passenger service but are controlled by the railroad hosting the operation, the two railroads will need to communicate so those aspects can be adequately addressed by the railroad's SSP. Furthermore, if the SSP plan contains elements that are applicable to the railroad hosting the passenger service, then the two railroads will need to coordinate those portions so that the identified hazard and resulting risk is mitigated or eliminated. A passenger railroad may have multiple railroads hosting its passenger train service on its system and will need to coordinate with each railroad. If the railroad hosting the passenger train service does not cooperate with the railroad providing the passenger train service to coordinate the applicable parts of the SSP, under proposed § 270.9, the railroad hosting the passenger train service may be subject to penalties because they may cause the railroad providing the passenger service to violate the requirements of this part.

In proposed paragraph (b), each SSP plan would have a policy statement that endorses the railroad's SSP. This policy statement should define, as clearly as possible, the railroad's authority for the establishment and implementation of the SSP. The policy statement would be required to be signed by the chief official of the railroad. This signature would indicate that the top level of management at the railroad endorses the SSP.

Paragraph (c) proposes to require a railroad to set forth a statement in its SSP plan that describes the purpose and scope of the railroad's SSP. The statement would be required to have, at a minimum, three elements.

First, the statement would describe the safety philosophy and safety culture of the railroad. Proposed § 270.101(b) requires a railroad to design its SSP so that it promotes and supports a positive safety culture. In order for the railroad to properly design its SSP so that it complies promotes and supports a positive safety culture, it would first need to define what exactly is its safety culture and philosophy. Once its safety culture is defined, the railroad would have to describe how it measures the success of its safety culture pursuant to paragraph (v) of this section.

Second, the railroad shall describe the railroad's management's responsibilities within the SSP. This description would make clear who within the railroad's management are responsible for which aspects of the SSP.

Finally, the railroad would be required to describe how host railroads, contractors, shared track/corridor operators, and any other entity or person that provides significant safety-related services would, as appropriate, support and participate in the railroad's SSP. It is essential that these entities have defined roles in the railroad's program. As addressed in proposed § 270.103(a)(2), each railroad that hosts passenger train service for a railroad subject to this part would need to communicate with the railroad that provides or operates such passenger service and coordinate the portions of the SSP plan applicable to the railroad hosting the passenger train service. This section requires the railroad that provides passenger service to describe how it plans on satisfying § 270.103(a)(2).

Proposed paragraph (d) addresses the importance of goals in an SSP. The central goal of an SSP is to manage risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. FRA believes one way to achieve this central goal is for a railroad to set forth goals that are designed in such a way that when the railroad achieves these goals, the central goal is achieved as well. APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads served as the model for the guidelines set forth in paragraph (d).

Paragraph (d) would require a railroad to include as part of its SSP plan a statement that defines the system safety goals. The statement would also describe the clear strategies on how these goals will be achieved. By setting forth the strategies by which it will achieve the goals, the railroad would have the opportunity to provide its vision on how it would ultimately reduce the numbers and rates of railroad accidents, incidents, injuries and fatalities. The statement would also describe what the railroad's management's responsibilities are to achieve the system safety goals. By stating the railroad management's responsibilities to achieve the stated goals, the railroad and FRA would know who, and at what level within management, is responsible for ensuring that the stated goals are achieved.

Rather than setting forth specific requirements that these goals must satisfy, FRA proposes general requirements. This would allow railroads the flexibility to establish goals specific to their operations. The general parameters of these goals are that they should be—

- Long-term so that they are relevant to the railroad's SSP throughout the life of the railroad. This does not mean that goals cannot have relevance in the short-term. Rather, goals must have significance beyond the short-term and continue to contribute to the SSP.
- Meaningful so that they are not so broad that they cannot be attributed to specific aspects of the railroad's operations. The desired results must be specific and must have a meaningful impact on safety.
- Measurable so that they are designed in such a way that it is easily determined whether each goal is achieved or at least progress is being made to achieve the goal.
- Consistent with the overall goal(s) of the SSP, in that they must be focused on the identification of hazards and the elimination or mitigation of the resulting risks.

Proposed paragraph (e) requires a railroad to set forth a statement in its SSP plan describing the characteristics of the railroad system. Generally, this description should be sufficient to allow persons who are not familiar with the railroad's operations and railroad operations in general to understand the railroad's system and its basic operations. Specifically, this statement would describe the following:

- The history of the railroad, including when and how the railroad was established, the history of service delivery, and the major milestones in the railroad's history;
- The railroad operations (including any host operations), including the role, responsibilities, and organization of the railroad operating departments;
- The physical characteristics of the railroad, including the number miles of track the railroad operates, the number of stations the railroad services, the number and types of grade crossings the railroad operates over, and on which segments the railroad shares track with other railroads;
- The scope of the service the railroad provides, including the number of passengers, the number of routes, and the days and hours when service is

provided. The railroad may also provide a system map;

• The maintenance activities performed by the railroad, including the role, responsibilities, and organization of the railroad's various maintenance departments and the type of maintenance required by the railroad's operations and facilities;

• Identification of the railroad's physical plant, including the size, location, and function of the railroad's physical assets, such as maintenance facilities, offices, stations, vehicles, signals, and structures for all modes; and

• Any other aspects of the railroad pertinent to the railroad's operations.

Proposed paragraph (e)(2) would also require a railroad to identify in its SSP plan the entities and persons that provide significant safety-related services. The term ''significant safety-related services'' is intended to be understood broadly to give a railroad the flexibility to evaluate the services other entities provide to the railroad and the degree that these services are safety-related. FRA recognizes that not all railroad operations are the same; thus, not all entities and persons that provide significant safety-related services to a railroad will be the same. During its review of a railroad's SSP plan, FRA would determine whether the entities and persons the railroad has described as providing or utilizing significant safety-related services sufficiently describe such services. FRA would work with the railroad to make the determination. FRA seeks comment on whether to require a railroad to identify entities that not only provide significant safety-related services but also utilize significant safety-related services. A railroad would have significant discretion to identify which entities utilize significant safety-related services.

Paragraph (f) proposes to require a railroad to set forth a statement in its SSP plan that describes the management/organizational structure of the railroad. This statement would include: a chart or other visual representation of the organizational structure of the railroad; a description of how the safety responsibilities are distributed within the railroad organization; clear identification of the lines of authority used by the railroad to manage safety issues; and a description of the relationships and individual responsibilities in an SSP between the railroad, host railroad(s), contract operator(s), shared track/corridor operator(s), and other entities that provide significant safety-related services. Under paragraph (f)(1), the chart or other visual representation of the organizational structure of the railroad would not need to be overly detailed. Rather, it must identify the divisions within the railroad, the key management positions within each division, and titles of the officials in those positions.

When identifying the divisions within a railroad under paragraph (f)(2), it is important for the railroad to identify how the safety responsibilities are distributed within these divisions. A railroad may have one division that handles safety matters or there may be multiple divisions and each division has separate and distinct responsibilities for handling safety matters. Regardless how the railroad distributes the responsibility to manage safety issues, it is important that the railroad identifies and describes how safety is being managed on its system.

Under paragraph (f)(3), the railroad would also need to clearly identify which of the management positions within the division(s) are responsible for managing the safety issues within the railroad. Identification of these lines of authority would allow FRA to determine who within the organization and at what level is responsible for managing the safety issues. While FRA recognizes that safety is everybody's responsibility within the railroad organization, the management personnel responsible for managing the safety issues would need to be identified.

Paragraph (f)(4) would require the railroad to describe the relationship and responsibilities between it and certain other entities and persons. These entities include: host railroads, contract operators, shared track/corridor operators, and other entities or persons that provide significant safety-related services. Describing the relationship and responsibilities between the railroad and the host railroads, contract operators, and shared track/corridor operators should be relatively easy because the railroads most likely have entered into contracts with these entities that outline this information. Regarding the relationships and responsibilities between the railroad and other entities or persons that provide significant safety-related services that must be identified under paragraph (e)(2) of this section, the rule would provide the railroads the flexibility to determine who provides significant safety-related services. FRA intends to provide such flexibility in paragraph (f)(4) when a railroad must identify the relationships among these entities or persons. The description should be detailed enough so that FRA can understand the basis of the relationship and the responsibilities of each entity or person based on that relationship.

Paragraph (f)(4) would also require the railroad to describe the roles and responsibilities in the railroad's SSP for each host railroad, contract operator, shared track/corridor operator, and other entity or person that provides significant safety-related services. The railroad would simply have to provide a statement detailing what the roles of these entities specifically are in the railroad's SSP. Since these entities play a key role in the safe operation of the railroad, they would, presumably, have a role in the railroad's SSP.

Proposed paragraph (g) requires a railroad's SSP plan to include a plan that describes how the railroad intends to implement its SSP. This is a general requirement and FRA does not expect the railroad to provide a discussion of how it would implement every single aspect of its SSP. Rather, the implementation plan must, at a minimum, describe roles and responsibilities of each position or job function (including those held by employees, contractors who provide significant safety-related services, and other entities or persons that provide significant safety-related services) that has significant responsibilities to implement the SSP. The plan must also identify the milestones necessary to be reached to properly implement the SSP. The positions or job functions that would be described are those that are responsible for implementing the major elements of the SSP, to the extent that the individuals filling these positions/job functions have clear and concrete roles and responsibilities. Every single individual who participates in the railroad's SSP does not need to be described in the implementation plan; rather, it is only those individuals who have significant responsibilities for implementing the railroad's SSP. The phrase ''significant responsibilities'' is intended to be broadly understood to provide the railroads the flexibility to determine, based on their individual operations, what may be considered ''significant responsibilities.''

In its SSP plan a railroad would also set forth the milestones that should be reached so that it properly implements its SSP. Aside from requiring the SSP be fully implemented within 36 months of approval, FRA does not provide specific milestones that the railroad must achieve. Each railroad's SSP would be different; therefore, the milestones that must be achieved to properly implement an SSP would be different. A railroad would have the flexibility to determine, based on its own SSP and instead of

rigid requirements, realistic benchmarks that need to be achieved to properly implement its SSP. FRA plans on working with the railroads to determine what these milestones should be. These milestones are not permanent; FRA understands that there are unforeseeable circumstances that can cause a railroad to adjust the implementation of its SSP and subsequently adjust the milestones. The important element is that the railroad sets forth milestones so that there are standards that can be used to determine the progress of the railroad's implementation of its SSP.

Proposed paragraph (h)(1) requires a railroad's SSP plan to identify and describe the processes and procedures used for maintenance and repair of its infrastructure and equipment directly affecting railroad safety. The phrase ''infrastructure and equipment directly affecting railroad safety'' is intended to be broadly understood in order to provide the railroad the opportunity to take a realistic survey of its particular operations and make the determination of which infrastructure and equipment directly affects the safety of that railroad. However, as guidance, a list of the types of infrastructure and equipment that are considered to directly affect railroad safety is provided. This list includes: fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, and traction power distribution systems. Once the railroad has determined what infrastructure and equipment directly affect railroad safety, it would then identify and describe the processes and procedures used for the maintenance and repair of that infrastructure and equipment. This section would not require the railroad to establish processes and procedures for maintenance and repair, however, because the railroad most certainly should already have such a process in place. The safety of a railroad's operations depends greatly upon the condition of its infrastructure and equipment. Therefore, these maintenance and repair processes and procedures should and are expected to already be in place.

Under proposed paragraph (h)(2), each description of the process used for maintenance and repair of infrastructure and equipment directly affecting safety would also include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment. Multiple FRA regulations require a railroad to conduct testing and inspection of infrastructure and equipment and, in paragraph (h)(2), FRA is interested in the processes and procedures that the railroad has developed to meet these regulatory standards. For example, pursuant to part 234, a railroad must inspect, test, and repair warning systems at grade crossings. Under proposed paragraph (h)(2), the railroad would describe the internal procedures it developed to educate its employees on the proper way to conduct the inspection, testing and repair of grade crossing warning systems. Typically, railroads have a manual or manuals that describing the maintenance and testing procedures and processes used to conduct testing and inspections of the infrastructure and equipment. In most cases, simply referencing the current processes and procedures in the SSP plan would satisfy this paragraph, rather than providing the entire manual(s). If FRA reviews a manual, FRA would determine if the manual is current, if it is readily available to the employees who are performing the functions it addresses, and if these employees are trained on it.

While FRA is always concerned with the safety of railroad employees performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of the United States Department of Labor's Occupational Safety and Health Administration (OSHA). It is not FRA's intent in this rule to displace OSHA's jurisdiction with regard to the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in 49 CFR part 218. In other rules, FRA has included a provision that makes it clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. *See, e.g.,* 49 CFR 238.107(c). FRA seeks comment whether such a clarifying statement is necessary for any such subject matter that this proposed part may affect.

Proposed paragraph (i) requires a railroad's SSP plan to set forth a statement describing both the railroad's processes and procedures for developing, maintaining, and ensuring compliance with the railroad's rules and procedures directly affecting railroad safety and the railroad's processes for complying with railroad safety laws and regulations. This statement would describe how the railroad not only develops, maintains, and complies with its own safety rules, but also how the railroad complies with applicable safety laws and regulations. The statement would include identification of the railroad's operating and safety rules and procedures that are subject to review under Chapter II, Subtitle B of Title 49 of the Code of Federal Regulations, i.e., all of FRA's railroad safety regulations.

The railroad would identify the techniques used to assess the compliance of its employees with applicable railroad safety laws and regulations and the railroad's operating and safety rules and maintenance procedures. Both Federal railroad safety laws and regulations and railroad operating and safety rules and maintenance procedures are effective at increasing the safety of the railroad's operations only if the railroad and its employees comply with such rules and procedures. By ensuring compliance with such rules and procedures, the overall safety of the railroad is improved.

The railroad would also identify the techniques used to assess the effectiveness of the railroad's supervision relating to the compliance with applicable railroad safety laws and regulations and the railroad's operating and safety rules and maintenance procedures. If the railroad's supervision relating to compliance with these rules and procedures is effective, the employees' compliance should also be effective, thus improving the overall safety of the railroad.

Paragraph (j) proposes to require that a railroad's SSP plan describe the railroad's plan on how the necessary employees will be trained on the SSP. This SSP training plan would describe the procedures in which employees who are responsible for implementing and supporting the program, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services would be trained on the railroad's SSP. A railroad's SSP can be successful only if those who are responsible for implementing and supporting the program understand the requirements and goals of the program. To this end, a railroad would train those responsible for implementing and supporting the railroad's SSP on the elements of the program so that they have the knowledge and skills to fulfill their responsibilities under the program.

For each position or job function that has been identified under proposed paragraph (g)(1) as having significant responsibility for implementing a railroad's SSP, the railroad's training plan would describe the frequency and the content of the training on the SSP that the position receives. If the railroad does not identify a position or job function under paragraph (g)(1) as having significant responsibilities to implement the SSP but the position or job function is safety related or has a significant impact on safety, personnel

in these positions or performing these job functions would be required to receive basic training on the system safety concepts and the system safety implications of their position or job function. Even though the personnel may not have responsibilities to implement the railroad's SSP, they would have an impact on the program because their position or job function is safety-related or has a significant impact on safety, or both. It is important that all persons who may have an impact on the success of a railroad's SSP understand the requirements of the program so they can work together to achieve the goals of the program.

A railroad could conduct its SSP training by interactive computer-based training, video conferencing, formal classroom training, or some combination of all three. Paragraph (j) is not intended to limit the forms of training; rather, it is intended to provide the railroads the flexibility to conduct training using methods other than traditional classroom training. SSP training could also be combined with a railroad's regular safety or rules training and in some cases SSP training could be included in field ''tool box'' safety training sessions. The railroad would describe the process it would use to maintain and update the SSP training records. The railroad would also describe the process that it would use to ensure that it is complying with the requirements of the training plans as required by this part.

Proposed paragraph (k) requires that a railroad's SSP plan describe the processes used by the railroad to manage emergencies that may arise within its system. Part of this description should include the processes the railroad uses to comply with the applicable emergency equipment standards contained in part 238 of this chapter and the passenger train emergency preparedness requirements contained in part 239 of this chapter.

Proposed paragraph (l) requires that the railroad's SSP plan describe the programs that it has established that protect the safety of its employees and contractors. The railroad would describe: (1) The processes that have been established to help ensure the safety of employees and contractors while working on or in close proximity to the railroad's property as described pursuant to paragraph (e) of this section; (2) processes to help ensure that employees and contractors understand the requirements established by the railroad pursuant to paragraph (g)(1) of this section; and (3) fitness-for-duty programs, including standards for the control of alcohol and drug use contained in part 219 of this chapter, fatigue management programs under this part, and medical monitoring programs.

Employees and contractors of the railroad are exposed to many hazards and risks while on railroad property. A railroad's SSP would be required to take into consideration the safety of these persons and the programs and processes it has already in place to address the hazards they face and resulting risks. While FRA is always concerned with the safety of employees in performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of OSHA. As discussed earlier, it is not FRA's intent in this rule to displace OSHA's jurisdiction with regard to the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as for blue signal protection. As noted, in other rules, FRA has included a provision that makes it clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. FRA seeks comment whether such a clarifying statement is necessary for any such subject matter that this proposed part may affect.

Proposed paragraph (m) requires that a railroad's SSP plan describe the railroad's public safety outreach program that provides safety information to the railroad's passengers and the general public. A safety outreach program provides the necessary safety information to the railroad's passengers and to the public at large so that they minimize their exposure to the hazards and resulting risks on the railroad. A railroad's passengers would potentially play an important role in the success of the railroad's SSP. The more information passengers have regarding the railroad's safety programs, the more they would contribute to the success of the railroad's SSP.

Proposed paragraph (n) requires that a railroad's SSP plan to describe the processes that the railroad uses to receive notification of accidents, investigate and report those accidents, and develop, implement, and track any corrective actions found necessary to address the investigations' finding. These processes should already be in place because they are necessary to comply with the requirements of part 225 of this chapter. Accidents can reveal hazards and risks on the railroad's system, which the railroad can then address as part of its SSP.

Proposed paragraph (o) requires a railroad's SSP plan to describe the processes that the railroad has or would put in place to collect, maintain, analyze, and distribute safety data in support of the SSP. These processes are important because they will provide the railroad with the information necessary to determine the effectiveness of its SSP.

Proposed paragraph (p) requires a railroad's SSP plan to describe the process it employs to address safety concerns and hazards during the safety-related contract procurement process. This applies to safety-related contracts so that the railroad can ensure that safety concerns and hazards that may result from the procurement are addressed as necessary.

The main components of an SSP are the risk-based hazard management program and the risk-based hazard analysis. The railroad would use the risk-based hazard management program to describe the various methods, processes, and procedures it will employ to properly and effectively identify, analyze, and mitigate or eliminate hazards and resulting risks. The risk-based hazard analysis is where the railroad will actually identify, analyze and determine the specific actions it will take to mitigate or eliminate hazards and the resulting risks. Paragraphs (q) and (r) set forth the proposed elements of the railroad's risk-based hazard management program and risk-based hazard analysis. Both of these proposed paragraphs implement sections 103(c) through (f) of RSIA. 49 U.S.C. 20156(c)–(f).

The risk-based hazard management program will be a fully implemented program within the railroad's SSP. Proposed paragraph (q) requires a railroad to describe various methods, processes, and procedures that, when implemented, will identify, analyze, and mitigate or eliminate hazards and the resulting risks on the railroad's system. Proposed paragraph (q) embodies FRA's intent to provide railroads with the flexibility to tailor its SSP to its specific operations. Paragraph (q) does not set forth rigid requirements of a risk-based hazard management program. Rather, more general guidelines are provided and the railroad is able to apply these general guidelines to its specific operations.

Paragraph (q)(1) would require a railroad to identify the positions within the railroad who will be responsible for administering the risk-based hazard management program. These positions would be responsible for developing and implementing the risk-based hazard management program. Rather than identifying the specific individuals, the

railroad would identify the positions that are responsible for administering the risk-based hazard management program so that the SSP will not have to be updated each time an individual changes position.

Paragraph (q)(2) would require a railroad to identify the stakeholders who will participate in the hazard management program. This means the railroad will identify all of the entities who will be affected and may play a role in the risk-based hazard management program.

Paragraph (q)(3) would require the railroad to identify the structure and participants in any hazard management teams or safety committees that the railroad may establish to support the risk-based hazard management program. By establishing these teams or committees, the railroad can extensively analyze hazards and risks and thoroughly consider the specific actions to effectively mitigate or eliminate the hazards and risks.

Paragraph (q)(4) would require the railroad to describe the process for setting goals for the risk-based hazard management program and how the performance against the goals will be performed. Similar to the SSP, establishing clear and concise goals will play an important role in the success of a railroad's risk-based hazard management program. The goals should be tailored so that the central goal of the risk-based hazard management program is supported.

Paragraph (q)(5) would require the railroad to describe the process used in the risk-based hazard analysis to identify hazards on the railroad's system. The railroad would determine the methods it would use in the risk-based hazard analysis in proposed paragraph (r) of this section, to identify hazards on various aspects of its system. This would be the railroad's opportunity to consider any new or novel techniques or methods to identify hazards that best suit that railroad's operations. FRA plans on working with railroads, along with providing guidance, to explore the various methods and techniques it may use.

Paragraph (q)(6) would require the railroad to describe the processes or procedures that will be used in the risk-based hazard analysis to analyze hazards and support the risk-based hazard management program. In proposed paragraph (q)(5), the railroad would describe the process it will use to identify hazards, in proposed paragraph (q)(6), the railroad will describe the processes and procedures it will use to analyze the identified hazard. By analyzing the hazards, the railroad gains the necessary knowledge to effectively identify the resulting risk.

Paragraph (q)(7) would require the railroad to describe the methods used in the risk-based hazard analysis to determine the severity and frequency of the hazard and the resulting risk. A railroad will want to identify the most severe hazards with the greatest amount of risk so that it may prioritize the mitigation or elimination of that hazard and risk. By developing a method that would effectively identify the severity and frequency of hazards and the resulting risks, the railroad will be able to effectively prioritize the mitigation or elimination of the hazard and resulting risks.

Paragraph (q)(8) would require a railroad to describe the methods used in the risk-based hazard analysis to identify actions that mitigate or eliminate hazards and corresponding risks. Here the railroad would identify the methods or techniques it will use to determine which actions it would need to take to mitigate or eliminate the identified hazards and risks. As with identifying the hazards and resulting risks, this would be the railroad's opportunity to consider any new or novel methods to mitigate or eliminate hazards and the resulting risks that best suits that railroad's operations. FRA recognizes that not all hazards and resulting risks can be eliminated or even mitigated, due to costs, feasibility, or other reasons. However, FRA would expect the railroads to consider all reasonable actions that may mitigate or eliminate hazards and the resulting risks and to implement those actions that are best suited for that railroad's operations.

Paragraph (q)(9) would require the railroad to describe how decisions affecting the safety of the rail system will be made relative to the risk-based hazard management program. Railroads make numerous decisions every day that affect the safety of the rail system. Paragraph (q)(9) would require a railroad to describe how those decisions will be made when they relate to the risk-based hazard management program.

Paragraph (q)(10) would require the railroad to describe the methods used in the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system. As with the SSP, the railroad will describe the methods that it has implemented as part of the risk-based hazard management program that will support continuous safety improvement.

Paragraph (q)(11) would require the railroad to describe the methods used to maintain records of the identified hazards and risks throughout the life of the rail system. In this proposed paragraph the railroad will describe how it plans to maintain the records of the results of the risk-based hazard analysis. While the railroad will not provide these records in its SSP plan submission to FRA, the railroad would be required to make the results of the risk-based hazard analysis available upon request to representatives of FRA pursuant to proposed § 270.201(a)(2).

Once FRA has approved a railroad's SSP plan pursuant to proposed § 270.201(b), the railroad would be required to conduct a risk-based hazard analysis. Proposed paragraph (r)(1) is the RSIA-mandated ''risk analysis'' that a railroad must conduct. As discussed earlier, RSIA requires a railroad, as part of its development of a railroad safety risk reduction program (e.g., an SSP), to ''identify and analyze the aspects of its railroad, including operating rules and practices, infrastructure, equipment, employee levels and schedules, safety culture, management structure, employee training, and other matters, including those not covered by railroad safety regulations or other Federal regulations, that impact railroad safety.'' 49 U.S.C. 20156(c). Proposed paragraph (r)(1) follows the language of RSIA; however, in the list of the aspects of the railroad system that must be analyzed, paragraph (r)(1) does not include ''safety culture.'' Safety culture, which proposed paragraph (c)(1) of this section would require the railroad to describe, is not something that a railroad can necessarily ''identify and analyze'' as readily as the other aspects listed. A railroad would have to describe how it measures the success of its safety culture pursuant to § 270.103(v). Proposed paragraph (r)(1) would also require the railroad to analyze any new technology identified in proposed paragraph (t) of this section. Absent safety culture and including new technology, paragraph (r)(1) would require a railroad to analyze: operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, employee fatigue as identified in paragraph (s) of this section, new technology as identified in paragraph (t) of this section, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations. The railroad's operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, and employee training, would already be identified by the railroad pursuant to this part and would be part of the SSP plan so the

analysis and identification of hazards and resulting risks should be rather straightforward. *See* proposed paragraphs (e), (f), and (h) through (j) of this section. Employee fatigue is addressed further in proposed paragraph (t). The railroad would determine which aspects have an impact on railroad safety that are not covered by railroad safety regulations or other Federal regulations. When analyzing the various aspects, the railroad will apply the risk-based hazard analysis methodology previously identified in proposed paragraph (q)(5)–(7).

Once the railroad has analyzed the various aspects of its operations and identified hazards and the resulting risks, the railroad would be required to manage these risks. This proposed requirement is derived directly from RSIA, which requires a railroad, as part of its SSP, to have a risk mitigation plan that mitigates the aspects that increase risks to railroad safety and enhances the aspects that decrease the risks to railroad safety. 49 U.S.C. 20156(d). In proposed paragraph (r)(2), the railroad will use the methods described in proposed paragraph (q)(8) to identify and implement specific actions to mitigate or eliminate the hazards and risks identified by proposed paragraph (r)(1).

A risk-based hazard analysis is not a one-time event. The railroad operates in a dynamic environment and certain changes in that environment may expose new hazards and risks that a previous risk-based hazard analysis did not identify. Proposed paragraph (r)(3) identifies the changes that FRA believes are significant enough to require that a railroad conduct a new risk-based hazard analysis. A railroad would be required to conduct a risk-based hazard analysis when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

As part of its SSP plan, paragraph (s) would require a railroad to set forth a technology implementation plan. *See* 49 U.S.C. 20156(d)(2). To establish a technology implementation plan, a railroad would first conduct a technology analysis. A technology analysis would evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified in the risk-based hazard analysis conducted pursuant to proposed paragraph (r) of this section. As part of its evaluation, a railroad would consider the safety impact, feasibility, and the cost and benefits of implementing the technologies to mitigate or eliminate hazards and the resulting risks. RSIA mandates that a railroad consider certain technologies as part of its technology analysis. These technologies are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

FRA is not proposing a specific formula that a railroad must use to determine whether it should implement any of the technology analyzed in the technology analysis. Rather, the railroad would consider the safety impact, feasibility, and the cost and benefits of these technologies and based on the railroad's specific operations, decide whether to implement any of the technologies. Technology has proved to be an invaluable tool to manage hazards across all modes of transportation, and a robust SSP would certainly include risk mitigation technology.

If a railroad decides to implement any of the technologies identified in the technology analysis, the railroad would be required to set forth a prioritized implementation schedule for the development, adoption, implementation, and maintenance of those technologies over a 10-year period. By establishing this implementation schedule, the railroad would be able to describe its plan on how it would apply technology on its system to mitigate or eliminate the identified hazards and resulting risks.

Paragraph (s)(3) would state that, except as required by 49 CFR part 236, subpart I (Positive Train Control Systems), if a railroad decides to implement a PTC system as part of its technology implementation plan, the railroad shall set forth and comply with a schedule that would implement the system no later than December 31, 2018, as required by the RSIA. See 49 U.S.C. 20156(e)(4)(B). However, this paragraph would not, in itself, require a railroad to implement a PTC system. In addition, FRA specifically seeks public comment on whether a railroad electing to implement a PTC system would find it difficult to meet the December 31, 2018 implementation deadline. If so, what measures could be taken to assist a railroad struggling to meet the deadline and achieve the safety purposes of the statute?

As part of its SSP, RSIA requires a railroad to establish a fatigue management plan. 49 U.S.C. 20156(d)(2). Section 103(f) of RSIA sets forth the various requirements of a fatigue management plan. 49 U.S.C. 20156(f). On December 8, 2011, RSAC voted to establish a Fatigue Management Plans Working Group (FMP Working Group). The purpose of the group is to provide ''advice regarding the development of implementing regulations for Fatigue Management Plans and their deployment under the Rail Safety Improvement Act of 2008''. *Railroad Safety Advisory Committee Task Statement: Fatigue Management Plans,* Task No.: 11–03, Dec. 8, 2011. (A copy of this statement is included in the public docket for this SSP rulemaking.) Specifically, the FMP Working Group is tasked to: ''review the mandates and objectives of the [RSIA] related to the development of Fatigue Management Plans, determine how medical conditions that affect alertness and fatigue will be incorporated into Fatigue Management Plans, review available data on existing alertness strategies, consider the role of innovative scheduling practices in the reduction of employee fatigue, and review the existing data on fatigue countermeasures.'' *Id.* FRA contemplates that the FMP Working Group will develop proposed rule text for approval by the RSAC and submission to FRA that will prescribe recommended requirements of the Fatigue Management Plan. FRA will consider any RSAC recommendation in developing proposed changes to the SSP rule.

Proposed paragraph (u) sets forth the proposed requirements for ensuring that safety issues are addressed whenever there are certain changes to the railroad's operations. Paragraph (u)(1) proposes to require each railroad to establish and set forth a statement in its SSP plan that describes the processes and procedures used by the railroad to manage significant operational changes, system extensions, system modifications, or other circumstances that will have a direct impact on railroad safety. Since these changes have a direct impact on safety, it is important that the railroad has a process that manages these changes so that safety is not compromised. The term ''significant changes that will have a direct impact on railroad safety'' is intended to be broadly understood; however, the other changes listed (significant operational changes, system extensions, system modifications) are the type of changes that would necessitate a process/procedure to properly manage them.

Proposed paragraph (u)(2) would require each railroad to establish in its SSP plan a configuration management

program. The term configuration management is defined in § 270.5 as ''a process that ensures that the configurations of all property, equipment, and system design elements are accurately documented.'' Accordingly, the railroad's configuration management program shall: (1) State who within the railroad has authority to make configuration changes; (2) establish processes to make configuration changes to the railroad's system; and (3) establish processes to ensure that all departments of the railroad affected by the configuration changes are formally notified and approve of the change.

Proposed paragraph (u)(3) requires a railroad to establish and describe in its SSP plan the process it uses to certify that safety concerns and hazards are adequately addressed prior to the initiation of operations and major projects to extend, rehabilitate, or modify an existing system or repair vehicles and equipment. By certifying that safety concerns have been addressed before the railroad initiates operations and major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment, the railroad minimizes the negative impact on safety that any of these activities may have.

As discussed previously, an SSP can only be effective at mitigating or eliminating hazards and risks if the railroad has a robust and positive safety culture. Pursuant to proposed § 270.101(b), a railroad would design its SSP so that it promotes and supports a positive safety culture, pursuant to proposed § 270.103(c)(1), a railroad will identify in its SSP plan its safety culture, and pursuant to proposed § 270.103(v) a railroad will describe in its SSP plan how it measures the success of its safety culture. A railroad cannot have a robust safety culture unless it actively promotes it and determines whether it is successful.

Section 270.105 Discovery and Admission as Evidence of Certain Information

As discussed in the Background section, FRA's Study concluded that it is in the public interest to protect certain information generated by railroads from discovery or admission into evidence in litigation. Section 109 of RSIA provides FRA with the authority to promulgate a regulation if FRA determines that it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to prescribe a rule that addresses the results of the Study.

Following the issuance of the Study, the RSAC met and reached consensus on recommendations for this rulemaking, including a recommendation on the discovery and admissibility issue. RSAC recommended that FRA issue a rule that would protect documents generated solely for the purpose of developing, implementing, or evaluating an SSP from (1) discovery, or admissibility into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving property damage, personal injury, or wrongful death; and (2) State discovery rules and sunshine laws which could be used to require the disclosure of such information.

In § 270.105, Discovery and admission as evidence of certain information, FRA proposes discovery and admissibility protections that are based on the Study's results and the RSAC recommendations. FRA modeled this proposed section after 23 U.S.C. 409. In section 409, Congress enacted statutory protections for certain information compiled or collected pursuant to Federal highway safety or construction programs. *See* 23 U.S.C. 409. Section 409 protects both data compilations and raw data. A litigant may rely on section 409 to withhold certain documents from a discovery request, in seeking a protective order, or as the basis to object to a line of questioning during a trial or deposition. Section 409 extends protection to information that may never have been in any Federal entity's possession.

Section 409 was enacted by Congress in response to concerns raised by the States that compliance with the Federal road hazard reporting requirements could reveal certain information that would increase the State's risk of liability. Without confidentiality protections, States feared that their ''efforts to identify roads eligible for aid under the Program would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made.'' *Pierce County* v. *Guillen,* 537 U.S. 129, 133–34 (2003) (citing H.R. Doc. No. 94–366, p. 36 (1976)).

The constitutionality and validity of section 409 has been affirmed by the Supreme Court of the United States. *See Pierce County* v. *Guillen.* In *Guillen,* the Court considered the application of section 409 to documents created pursuant to the Hazard Elimination Program, which is a Federal highway program that provides funding to State and local governments to improve the most dangerous sections of their roads. *Id.* at 133. To be eligible for the program, the State or local government must (1) maintain a systematic engineering survey of all roads, with descriptions of all obstacles, hazards, and other dangerous conditions; and (2) create a prioritized plan for improving those conditions. *Id.*

The Court held that section 409 protects information actually compiled or collected by any government entity for the purpose of participating in a Federal highway program, but does not protect information that was originally compiled or collected for purposes unrelated to the Federal highway program, even if the information was at some point used for the Federal highway program. *Guillen* at 144. The Court took into consideration Congress's desire to make clear that the Hazard Elimination Program ''was not intended to be an effort-free tool in litigation against state and local governments.'' *Id.* at 146. However, the Court also noted that the text of section 409 ''evinces no intent to make plaintiffs worse off than they would have been had section 152 [Hazard Management Program] funding never existed.'' *Id.* The Court also held that section 409 was a valid exercise of Congress's powers under the Commerce Clause because section 409 ''can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.'' *Id.*

A comparison of the text of section 409 with section 109, which was added to the U.S. Code by the RSIA, shows that Congress used similar language in both provisions. Given the similar language and concept of the two statutes, and the Supreme Court's expressed acknowledgement of the constitutionality of section 409, FRA views section 409 as an appropriate model for proposed § 270.105.

FRA proposes that under certain circumstances information (including plans, reports, documents, surveys, schedules, lists, or data) would not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages. This information may not be used in such litigation for any purpose when it is compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP, including the railroad's analysis of its safety risks conducted pursuant to proposed § 270.103(r)(1) and its identification of the mitigation measures with which it would address those risks pursuant to proposed § 270.103(r)(2). Proposed § 270.105(a) applies to information that may not be in the Federal government's

possession; rather, it may be information the railroad has as part of its SSP but would not be required to provide to the Federal government under this part.

The RSIA identifies reports, surveys, schedules, lists, and data as the forms of information that should be included as part of FRA's Study. 49 U.S.C. 20119(a). However, FRA does not necessarily view this as an exclusive list. In the statute, Congress directed FRA to consider the need for protecting information that includes a railroad's analysis of its safety risks and its statement of the mitigation measures with which it would address those risks. Therefore, FRA deems it necessary to include ''documents'' and ''plans'' in this proposed provision to effectuate Congress's directive in section 109 of RSIA. Notwithstanding, FRA does not propose protecting all documents plans that are part of an SSP. Rather, as proposed in § 270.105(a), the document has to be ''compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program under this part.'' The meaning of ''compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program under this part'' is discussed below.

As discussed previously, the proposed regulation would require a railroad to implement its SSP through an SSP plan. While the railroad will not provide in the SSP plan that it submits to FRA the results of the risk-based hazard analysis and the specific elimination or mitigation measures it will be implementing, its own SSP plan may contain this information while it's in possession of the railroad. Therefore, to adequately protect this type of information, the term ''plan'' is added to cover a railroad's SSP Plan and any elimination or mitigation plans.

It is important to note that these proposed protections will only extend to plans, reports, documents, surveys, schedules, lists, or data that are ''compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program.'' The term ''compiled and collected'' is taken directly from the RSIA. FRA recognizes that railroads may be reluctant to compile or collect extensive and detailed information regarding the safety hazards and resulting risks on their system if this information could potentially be used against them in litigation. The term ''compiles'' refers to information that was generated by the railroad for the purposes of an SSP; whereas the term ''collected'' refers to information that was not necessarily generated for the purposes of the SSP, but was assembled in a collection for use by the SSP. It is important to note that the collection is protected; however, each separate piece of information that was not originally compiled for use by the SSP remains subject to discovery and admission into evidence subject to any other applicable provision of law or regulation.

The information has to be compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP. The use of the term ''solely'' means that the original purpose of compiling or collecting the information was exclusively for the railroad's SSP. A railroad cannot compile or collect the information for one purpose and then try to use proposed paragraph (a) to protect that information because it simply uses that information for its SSP. The railroad's original and primary purpose of compiling or collecting the information must be for developing, implementing, or evaluating its SSP in order for the protections to be extended to that information. Further, if the railroad is required by another provision of law or regulation to collect the information, the protections of proposed paragraph (a) do not extend to that information because it is not being compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP.

The information must be compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP. These three terms are taken directly from RSIA. They cover the necessary uses of the information compiled or collected solely for the SSP. To develop an SSP, a railroad will need to conduct a risk-based hazard analysis to evaluate and identify the safety hazards and resulting risks on its system. This type of information is essential and is information that a railroad does not necessarily already have. In order for the railroad to conduct a robust risk-based hazard analysis to develop its SSP, the protections from discovery and admissibility are extended to the SSP development stage. Based on the information generated by the risk-based hazard analysis, the railroad would implement measures to mitigate or eliminate the risks identified. To properly implement these measures, the railroad will need the information regarding the hazards and risks on the railroads system identified during the development stage. Therefore, the protection of this information is extended to the implementation stage. Finally, the railroad would be required to evaluate whether the measures it implements to mitigate or eliminate the hazards and risks identified by the risk-based hazard analysis are effective. To do so, it will need to review the information developed by the risk-based hazard analysis and the methods it used to implement the elimination/mitigation measures. The use of this information in the evaluation of the railroad's SSP is protected.

The information covered by this proposed section shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. The protections apply to discovery, admission into evidence, or consideration for other purposes. The first two situations come directly from RSIA; however, FRA determined that for the protections to be effective they must also apply to any other situation where a litigant might try to use the information in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. For example, under proposed § 270.105, a litigant would be prohibited from admitting into evidence a railroad's risk-based hazard analysis; however, without the additional language, the railroad's risk-based hazard analysis could be used by a party for the purpose of refreshing the recollection of a witness or by an expert witness to support an opinion. The additional language, ''or considered for other purposes,'' ensures that the protected information remains out of a proceeding completely. The protections would be useless if a litigant is able to use the information in the proceeding for another purpose. To encourage railroads to perform the necessary vigorous risk analysis and to implement truly effective elimination or mitigation measures, the protections should be extended to any use in a proceeding.

FRA further notes that this proposed section applies to Federal or State court proceedings that involve a claim for damages involving personal injury, wrongful death, or property damage. This means, for example, if a proceeding has a claim for personal injury and a claim for property damage, the protections are extended to that entire proceeding; therefore a litigant cannot use any of the information protected by this section as it applies to either the personal injury or property damage claim. Section 109 of RSIA required the Study to consider proceedings that involve a claim for damages involving personal injury or wrongful death; however, in order to effectuate

Congress's intent behind section 103 of RSIA, that railroads engage in a robust and candid hazard analysis and develop meaningful mitigation measures, FRA has determined that it is necessary for the protections to be extended to proceedings that involve a claim solely for property damage. The typical railroad accident resulting in injury or death also involves some form of property damage. Without protecting proceedings that involve a claim for property damage, a litigant could bring two separate claims arising from the same incident in two separate proceedings, the first for property damages and the second one for personal injury or wrongful death and be able to conduct discovery regarding the railroad's risk analysis and to introduce this analysis in the property damage proceeding but not in the personal injury or wrongful death proceeding. This means that a railroad's risk analysis could be used against the railroad in a proceeding for damages. If this is the case, a railroad will be hesitant to engage in a robust and candid hazard analysis and develop meaningful mitigation measures. Such an approach would be nonsensical and would completely frustrate Congress's intent in providing FRA the ability to protect that information which is necessary to ensure that open and complete risk assessments are performed and appropriate mitigation measures are implemented. Therefore, in order to be consistent with Congressional intent behind section 103 of RSIA, FRA has determined to extend the protections in § 270.105 to proceedings that involve a claim for property damage. Furthermore, RSAC, which includes railroads and rail labor organizations, recommended to FRA that the protections be extended in this way to proceedings that involve a claim for property damage.

Proposed paragraph (b) would ensure that the proposed protections set forth in paragraph (a) do not extend to information compiled or collected for a purpose other than that specifically identified in paragraph (a). This type of information shall continue to be discoverable and admissible into evidence if it was discoverable and admissible prior to the existence of this section. This includes information compiled or collected for a purpose other than that specifically identified in paragraph (a) that either: (1) Existed prior to the effective date of this part; (2) existed prior to the effective date of this part and continues to be compiled or collected; or (3) is compiled and collected after the effective date of this part. Proposed paragraph (b) affirms the intent behind the use of the term ''solely'' in paragraph (a), in that a railroad could not compile or collect information for a different purpose and then expect to use paragraph (a) to protect that information just because the information is also used in its SSP. If the information was originally compiled or collected for a purpose unrelated to the railroad's SSP, then it is unprotected and would continue to be unprotected.

Examples of the types of information that proposed paragraph (b) applies to may be records related to prior incidents/accidents and reports prepared in the normal course of business (such as inspection reports). Generally, this type of information is often discoverable, may be admissible in Federal and State proceedings, and should remain discoverable and admissible where it is relevant and not unduly prejudicial to a party after the implementation of this part. However, FRA recognizes that evidentiary decisions are based on the facts of each particular case; therefore, FRA does not intend this to be a definitive and authoritative list. Rather, FRA merely provides these as examples of the types of information that paragraph (a) is not intended to protect.

Proposed paragraph (c) clarifies that a litigant cannot rely on State discovery rules, evidentiary rules, or sunshine laws that could be used to require the disclosure of information that is protected by paragraph (a). This provision is necessary to ensure the effectiveness of the Federal protections established in paragraph (a) in situations where there is a conflict with State discovery rules or sunshine laws. The concept that Federal law takes precedence where there is a direct conflict between State and Federal law should not be controversial as it derives from the constitutional principal that ''the Laws of the United States * * * shall be the supreme Law of the Land.'' U.S. Const., Art. VI. Additionally, FRA notes that 49 U.S.C. 20106 is applicable to this section, as FRA's Study concluded that a rule ''limiting the use of information collected as part of a railroad safety risk reduction program in discovery or litigation'' furthers the public interest by ''ensuring safety through effective railroad safety risk reduction program plans.'' *See* Study at 64. FRA concurs in this conclusion. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

As discussed in the Background section, FRA is currently developing, with the assistance of the RSAC, a separate risk reduction rule that would implement the requirements of sections 103 and 109 of the RSIA for Class I freight railroads and railroads with an inadequate safety performance. Section 109 of RSIA mandates that the effective date of a rule prescribed pursuant to that section must be one year after the publication of that rule. Therefore, proposed § 270.105 will not become effective until one year after the publication of the final rule for this proposed part. FRA believes that the public interest considerations for the protections in § 270.105 are the same for the forthcoming risk reduction rule for the Class I freight railroads and railroads with an inadequate safety performance. Therefore, FRA intends that proposed paragraph (d) extend the protections and the exceptions to those protections to the forthcoming risk reduction rule. The effect of this proposal is that the protections for the forthcoming risk reduction rule will be applicable one year after the publication of the final rule for this proposed part and not the final rule for the risk reduction rule. FRA seeks comments regarding this approach.

Subpart C—Review, Approval, and Retention of System Safety Program Plans

RSIA requires a railroad to submit its SSP, including any of the required plans, to the Administrator (as delegate of the Secretary) for review and approval. 49 U.S.C. 20156(a)(1)(B). Subpart C, Review, Approval, and Retention of System Safety Program Plans, addresses these RSIA requirements.

Section 270.201 Filing and Approval

This proposed section sets forth the requirements for the filing of an SSP plan and FRA's approval process.

Proposed paragraph (a)(1) requires that each railroad required to establish and fully implement an SSP submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer no later than 395 days after the effective date of the final rule or not less than 90 days prior to commencing operations, whichever is later. FRA seeks comment on whether electronic submission of an SSP plan

should be permitted and, if so, what type of process FRA should use to accept such submissions.

The railroad would not include the results of its risk-based hazard analysis in its SSP plan that it submits to FRA pursuant to proposed paragraph (a)(1) of this section. The SSP plan should only include the methods used to conduct its risk-based hazard analysis as described in proposed paragraph (q). However, since the risk-based hazard analysis is a vital element of an SSP, FRA would work with the railroads to ensure that this analysis is robust and addresses all the necessary aspects of the railroad's operations. To achieve this goal, FRA, its representatives, and States participating under part 212 of this chapter would have access to the railroad's risk-based hazard analysis pursuant to proposed paragraph (a)(2).

As part of its submission, the railroad will provide certain additional information. Primarily, under paragraph (a)(3), the SSP plan submission shall include the signature, name, title, address, and telephone number of the chief official responsible for safety and who bears primary managerial authority for implementing the SSP for the submitting railroad. The SSP plan shall also include the contact information for the primary person managing the SSP and the senior representatives of contract operators, shared track/corridor operators, and others who provide significant safety-related services. The contact information for the primary person managing the SSP is necessary so that FRA knows who to contact regarding any issues with the railroad's SSP. The contact information for the senior representatives of contract operators, shared track/corridor operators, and others who provide significant safety-related services is necessary so that FRA is aware of which entities will be involved in implementing and supporting the railroad's SSP.

Proposed paragraph (a)(4) references the requirements of proposed § 270.102(b), which generally requires a railroad to submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its SSP. When the railroad provides the consultation statement to FRA, proposed § 270.102(b)(4) also requires that the railroad provide a copy of the statement to certain directly affected employees identified in a service list. The directly affected employees can then file a statement within 60 days after the railroad filed its consultation statement, as discussed in proposed § 270.102(c)(1).

Under paragraph (a)(5), the chief official responsible for safety and who bears primary managerial authority for implementing the railroad's SSP shall certify that the contents of the railroad's SSP plan are accurate and that the railroad will implement the contents of the program as approved by § 270.201(b).

Paragraph (b) sets forth the proposed FRA approval process for a railroad's SSP plan. Within 90 days of receipt of an SSP plan, or within 90 days of receipt of each SSP plan submitted prior to the commencement of railroad operations, FRA will review the proposed SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. This review will also consider any statement submitted by directly affected employees pursuant to proposed § 270.102. This process will involve continuous communication between FRA and the railroad. As with drafting the plan, FRA intends to work with the railroads when reviewing the plan. Furthermore, FRA plans on issuing a guide that will provide additional guidance on this process.

Once FRA determines whether a railroad's SSP plan complies with the requirements of this part, FRA will notify, in writing, the primary contact person of each affected railroad whether the railroad's SSP plan is approved or not. If FRA does not approve a plan, it will inform the railroad of the specific points in which the plan is deficient. FRA will also provide the notification to each individual identified in the service list accompanying the consultation statement required under proposed § 270.102(b). Once the railroad has received notification that the plan is not approved and the specific points in which the plan is deficient, the railroad has 60 days to correct all of the deficiencies and resubmit the plan to FRA.

Proposed paragraph (c) addresses the process a railroad will follow whenever it amends its SSP. When a railroad amends its SSP plan it shall submit the amended SSP plan to FRA not less than 60 days prior to the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the proposed changes to the original, approved SSP plan. The cover letter should provide enough information so that FRA knows what is being added or removed from the original approved SSP. The railroad would also be required to follow the process it described pursuant to proposed § 270.102(d) regarding the consultation with directly affected employees concerning the amendment to the SSP plan. The railroad would describe in the cover letter the process it used to consult the directly affected employees on the amendments.

FRA recognizes that some amendments may be safety-critical and that the railroad may not be able to submit the amended SSP plan to FRA 60 days prior to the proposed effective date of the amendments. In these instances, the railroad shall submit the amended SSP plan to FRA as soon as possible. The railroad shall provide an explanation why the amendment is safety critical and describe the effects of the amendment.

FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person whether the proposed SSP plan has been approved by FRA. If the amended plan is not approved, FRA will provide the specific points in which the proposed amendment to the plan is deficient. If FRA does not notify the railroad whether the amended plan is approved or not by the proposed effective date of the amendment(s) to the plan, the railroad may implement the amendment(s) to the plan, subject to FRA's decision. If a proposed amendment to the SSP plan is not approved by FRA, the affected railroad shall correct any deficiencies identified by FRA. The railroad shall provide FRA with a corrected copy of the amended SSP plan no later than 60 days following receipt of FRA's written notice that any proposed amendment was not approved.

Paragraph (d) proposes to allow FRA to reopen consideration of a plan or amendment after initial approval of the plan or amendment. An example of a type of situation in which FRA may reopen review is if FRA determines that the railroad is not complying with its plan/amendment or information has been made available that was not available when FRA originally reviewed the plan or amendment. The determination of whether to reopen consideration will be made solely within FRA's discretion on made on a case-by-case basis.

Section 270.203 Retention of SSP plan

This section sets forth the proposed requirements related to a railroad's retention of its SSP plan. A railroad will be required to retain at its system and various division headquarters a copy of its SSP plan and a copy of any amendments to the plan. The railroad must make the plan and any amendments available to representatives of FRA and States participating under part 212 of this chapter for inspection

and copying during normal business hours.

Subpart D—System Safety Program Internal Assessments and External Auditing

Subpart D sets forth the proposed requirements related to a railroad's internal SSP assessment and FRA's external audit of the railroad's SSP.

Section 270.301 General

To determine whether an SSP is successful, it will need to be evaluated by both the railroad and FRA on a periodic basis. This proposed section sets forth the general requirement that a railroad's SSP and its implementation will be assessed internally by the railroad and audited externally by the FRA or FRA's designee.

Section 270.303 Internal system safety program assessment

This section sets forth the proposed requirements related to the railroad's internal SSP assessment. Once FRA approves a railroad's SSP plan, the railroad shall conduct an annual assessment the extent to which: (1) The SSP is fully implemented; (2) the railroad's compliance with the implemented elements of the approved SSP plan; and (3) the railroad has achieved the goals set forth in proposed § 270.103(d). This internal assessment is intended to provide the railroad with an overall survey of the progress of its SSP implementation and the areas in which improvement is necessary.

As part of its SSP plan, the railroad will describe the processes used to: (1) Conduct internal SSP assessments; (2) report the findings of the internal SSP assessments internally; (3) develop, track, and review recommendations as a result of the internal SSP assessments; (4) develop improvement plans based on the internal SSP assessments that, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; (5) manage revisions and updates to the SSP plan based on the internal SSP assessments; and (6) comply with the reporting requirements set forth in proposed § 270.201. By describing these processes, the railroad will detail how it plans to assess its SSP and how it will improve it if necessary. Since this is an internal assessment, a railroad will tailor the processes to its specific operations, and FRA will work with the railroad to determine the best method to internally measure the success of the railroad's SSP.

Within 60 days of completing its internal assessment, the railroad will submit a copy of its internal assessment report. This report will include the SSP assessment and the status of internal assessment findings and improvement plans. The railroad will also outline the specific improvement plans for achieving full implementation of its SSP and the milestones it has set forth. The railroad's chief official responsible for safety shall certify the results of the railroad's internal SSP plan assessment.

Section 270.305 External safety audit

This section sets forth the proposed process FRA will utilize when it conducts audits of a railroad's SSP. These audits will evaluate the railroad's compliance with the elements required by this part in the railroad's approved SSP plan. Because the railroad's SSP plan and any amendments would have already been approved by FRA pursuant to proposed § 270.201(b) and (c), this section is intended to permit FRA to focus on the extent to which the railroad is complying with its own plan.

Similar to the SSP plan review process, FRA does not intend the audit to be conducted in a vacuum. Rather, during the audit, FRA will maintain communication with the railroad and attempt to resolve any issues before completion of the audit. Once the audit is completed, FRA will provide the railroad with written notification of the audit results. These results will identify any areas where the railroad is not properly complying with its SSP, any areas that need to be addressed by the SSP but are not, or any other areas in which FRA believes the railroad and its plan are not in compliance with this part.

If the results of the audit require the railroad to take any corrective action, the railroad is provided 60 days to submit an improvement plan, for FRA approval, to address the audit findings. The improvement plan will identify who is responsible for carrying out the necessary tasks to address the audit findings and specify target dates and milestones to implement the improvements that address the audit findings. Specification of milestones is important because it will allow the railroad to determine the appropriate progress of the improvements while allowing FRA to gauge the railroad's compliance with its improvement plan.

If FRA does not approve a railroad's improvement plan, FRA will notify the railroad of the specific deficiencies in the improvement plan. The railroad will then amend the improvement plan to correct the deficiencies identified by FRA and provide FRA a copy of the amended improvement plan no later than 30 days after the railroad received notice from FRA that its improvement plan was not approved. This process is similar to the process provided when FRA does not initially approve a railroad's SSP. The railroad shall provide a report to FRA and States participating under part 212 of this chapter for review upon request regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process

Appendix B would contain guidance on how a railroad could comply with § 270.102, which states that a railroad must in good faith consult with and use its best efforts to reach agreement with all of its directly affected employees on the contents of the SSP plan. The appendix begins with a general discussion of the terms ''good faith'' and ''best efforts,'' explaining that they are separate terms and that each has a specific and distinct meaning. For example, the good faith obligation is concerned with a railroad's state of mind during the consultation process, and the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement with its directly affected employees. The appendix also explains that FRA will determine a railroad's compliance with the § 270.102 requirements on a case-by-case basis and outlines the potential consequences for a railroad that fails to consult with its directly affected employees in good faith and using best efforts.

The appendix also contains specific guidance on the process a railroad may use to consult with its directly affected employees. This guidance would not establish prescriptive requirements with which a railroad must comply, but would provide a road map for how a railroad may conduct the consultation process. The guidance also distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly. Overall, however, the appendix stresses that there are many compliant ways in which a railroad may choose to consult with its directly affected employees and

that FRA believes, therefore, that it is important to maintain a flexible approach to the § 270.102 consultation requirements, so a railroad and its directly affected employees may consult in the manner best suited to their specific circumstances.

VII. Regulatory Impact

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This NPRM has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this NPRM.

This NPRM directly responds to the Congressional mandate in section 103 of RSIA that FRA, by delegation from the Secretary, require each railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). The proposal also implements section 109 of RSIA which authorizes FRA, by delegation from the Secretary, to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a SSP. FRA believes that all of the requirements of the proposed rule are directly or implicitly required by RSIA and will promote railroad safety.

Most of the passenger railroads affected by this proposal already participate in APTA's system safety program and are currently participating in the APTA audit program. Railroads that are still negotiating contracts or not participating directly with APTA have developed, or are in the process of developing an APTA system safety program. There is one railroad that does not currently have or is developing an APTA system safety program, a small event commuter railroad in Iowa. That railroad has a very simple system, and FRA believes that the costs to develop its SSP pursuant to the proposed rule will be relatively low. Since the majority of intercity passenger or commuter railroads already have APTA system safety programs, there will not be a significant burden for these railroads to implement the regulatory requirements set forth in this proposed rule. Thus, the economic impact of the proposed rule is generally incremental in nature for documentation of existing information and inclusion of certain elements not already addressed by railroads in their programs. Regarding new start intercity passenger or commuter railroads, FRA currently and will continue to provide technical assistance to these types of railroads for the development and implementation of system safety programs and conduct of preliminary hazard analyses in the design phase leading to operations implementation.

For purposes of this analysis, FRA has analyzed the impact on the 30 existing passenger and railroads and projected costs for startup railroads. Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads, range from $1.8 million (discounted at 7%) to $2.5 million (discounted at 3%).

FRA believes that there will be new, startup, passenger railroads, that will be formed during the twenty-year analysis period. FRA is aware of two passenger railroads that intend to commence operations in the near future. FRA assumed that one of these railroads would begin developing its SSP in Year 2, and that the other would begin developing its SSP in Year 3. FRA further assumed that one additional passenger railroad would be formed and begin developing its SSP every other year after that, in Years 5, 7, 9, 11, 13, 15, 17 and 19. Total estimated twenty-year costs associated with implementation of the proposed rule, for startup passenger railroads, range from $270 thousand (discounted at 7%) to $437 thousand (discounted at 3%).

Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads and startup passenger railroads, range from $2.0 million (discounted at 7%) to $3.0 million (discounted at 3%).

TABLE 1—ESTIMATED COSTS OF THE NPRM

	Current dollar value	Discounted value 7 percent	Discounted value 3 percent
Total	$4,123,164.26	$2,022,847.85	$2,968,788.59

Properly implemented SSPs are successful in optimizing the returns on railroad safety investments. Railroads can use them to proactively identify potential hazards and resulting risks at an early stage thus minimizing associated casualties and property damage or avoiding them altogether. Railroads can also use them to identify a wide array of potential safety issues and solutions, which in turn allows them to simultaneously evaluate various alternatives for improving overall safety with resources available. This results in more cost effective investments. In addition, system safety planning helps railroads maintain safety gains over time. Without an SSP plan to guide them, railroads could adopt countermeasures to safety problems that become less effective over time as the focus shifts to other issues. With SSP plans, those safety gains are likely to continue for longer time periods. SSP plans can also be instrumental in reducing casualties resulting from hazards that are not well addressed through conventional safety programs, such as slips, trips and falls, or risks that occur because safety equipment is not used correctly, or routinely.

During the course of daily operations, hazards are routinely discovered. Railroads must decide which hazards to address and how, with the limited resources available for this purpose. Without an SSP plan in place, the decision process might become arbitrary. In the absence of the protections against discovery in legal proceedings for damages provided by the proposed rule, railroads might also be reluctant to keep detailed records of known hazards. With an SSP plan in place, railroads are able to identify and implement the most cost-effective measures to reduce casualties.

It is difficult, if not impossible, to completely segregate railroad expenses that go to enhance safety from other expenses. Railroad operations and maintenance activities have inherent safety-critical elements. Thus, every capital expenditure is likely to have a safety component, whether for equipment, right-of-way, signal or infrastructure. SSPs can increase the safety return on any investment related to the operation and maintenance of the railroad. FRA believes a very conservative estimate of all safety-related expenditures by all passenger

railroads affected by the proposed rule is $11.6 billion per year. In the first twenty years of the proposed rule, SSP plans can increase the cost effectiveness of investments totaling between $92 billion (discounted at 7%) and $139 billion (discounted at 3%).

Anecdotally, FRA is aware of a situation where noise walls had to be relocated after they were installed, because the walls were placed where they blocked sight lines for both motorists and train crews at a highway-rail grade crossing. If it cost $100,000 to move such a wall; if railroads avoided moving just five such walls per year or implementing other similar corrective actions, for a total savings of $500,000 per year, the rule would pay for itself. FRA believes that it is reasonable to expect far more savings in total when considering there are 30 existing passenger rail operators impacted. The impact on the effectiveness of investments by startup railroads would likely be greater than for existing railroads, as more of their expenses are for new infrastructure or other systems that can have safety designed in from the start at little or no marginal cost.

Another way to look at the benefits that might accrue from SSPs is to look at total passenger operation related accident costs. Over the time period 2001–2010, on average passenger railroads had 3,723.2 accidents per year. These accidents resulted in 207 fatalities; 3,543 other casualties; and $21.1 million in damage to railroad track and equipment. Of course, these accidents also caused damage to other property, delays on both railroads and highways, response costs and many other costs. In other analyses, FRA has found that the total societal cost of a serious accident is at least 2.33 times the fatality costs.[1] Such accident costs include fatality costs, injury costs, delay costs, response costs, damage to equipment, damage to track and structures, and equipment clearing, although there may be other societal costs not accounted for. Accidents that are serious enough to result in fatalities can result in such costs. Further, some accidents, such as grade crossing accidents, can be quite severe and result in very serious injuries even without a fatality. Although there is not a fatality, these types of accidents do result in societal costs. The total societal costs of serious accidents include the total societal costs of fatal accidents plus the total societal costs of other serious accidents. Therefore, the combined total societal costs of all kinds of serious accidents are greater than the total societal costs of fatal accidents. FRA believes multiplying societal costs of fatalities by a factor of 2.33 to derive total societal cost of serious accidents is a conservative approach to estimating such costs. In this case, if the fatality costs are $6.2 million per fatality, and the average number of fatalities is 207, then the societal cost of fatalities is $1,283.4 million per year, and the total societal cost of serious accidents related to passenger operations is $2,990.3 million per year.

Again, FRA has relevant anecdotal evidence that accident reduction benefits are achievable. One railroad installed track switches near an overhead highway bridge, yet the cost of locating the switches at a safer location would have been negligible. Derailments are much more likely at switch points than at most other locations on tracks. If a train were to derail into a bridge, as happened in Eschede Germany on June 3, 1998, the results would be catastrophic, on the order of the passenger accident occurring at Chatsworth, CA, on September 12, 2008. FRA estimates that the total societal cost of the Chatsworth accident was at least $380 million. If the probability of such a severe accident were reduced by 2 percent per year, the benefit, $7.6 million per year, would pay for the proposed rule many times over. FRA believes that an SSP will identify many of these avoidable risks at no cost. Again, the impact on the potential accidents of startup railroads can be greater, because those startup railroads can build safety in from the start, using their SSPs.

FRA analyzed the percentage of the potential accident reduction benefit pools that would have to be saved in order for the proposed rule to have accident reduction benefits at least equal to costs. The results are presented in the Table 2 below, which represents the percentage improvements in investment efficiency or accident costs for existing passenger railroads that would be necessary for this proposal to break even based on the estimated costs. FRA believes that such savings are more than attainable.

TABLE 2—ESTIMATED TWENTY-YEAR COSTS AS PERCENT OF BENEFIT POOLS

	Current dollar value %	Discounted value 7%	Discounted value 3%
Benefit Pool			
Railroad Investment	0.0018	0.0019	0.0018
Railroad Accidents	0.0068	0. 0074	0.0070

Further, FRA believes that an SSP can result in cost savings as a result of avoiding casualties from other types of accidents and incidents. Some of the basic hazards and resulting risks that an SSP can assist in mitigating or eliminating include ones that may be the cause of or contribute to slips, trips and falls. The potential risks of such hazards include falling from a bridge or scaffold because the required safety equipment was not worn, or slipping, falling or stumbling due to irregular surfaces, or because of oil, grease, or other slippery substance. Included here would also be the avoidance of injuries that could be caused by not wearing or improperly using safety equipment while performing regular maintenance tasks or operating power equipment. There are also potential risks that passengers, employees and others could also be exposed to due to holes or irregular surfaces on platforms or stairs. FRA believes that railroads will mitigate or eliminate many of these hazards and resulting risks through an SSP, but the process of eliminating or mitigating these risks will require additional costs, and it is impossible at present to estimate precisely the kinds of measures that may be adopted and their costs as well as benefits. Nonetheless, FRA believes that such measures will not be undertaken unless the benefits exceed the costs and the funding is available.

In conclusion, FRA is confident that the accident reduction and cost effectiveness benefits together would justify the $2.0 million (discounted at 7%) to $3.0 million (discounted at 3%)

[1] DOT/FRA—Positive Train Control Systems, Final Rule, Regulatory Impact Analysis, Document FRA 2008–0132–0060, *http://www.regulations.gov/#!documentDetail;D=FRA-2008-0132-0060.*

implementation cost over the first twenty years of the proposed rule.

B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all information and comments received in the public comment process when making a determination regarding the economic impact on small entities in the final rule.

FRA estimates that the total cost for the proposed rule will be $4.1 million (undiscounted)—$2.0 million (discounted at 7 percent), or $3.0 million (discounted at 3 percent), for the railroad industry over a 20-year period. Based on information currently available, FRA estimates that 1 percent of the total railroad costs associated with implementing the proposed rule would be borne by small entities. FRA generally uses conservative assumptions in its costing of rules.

There are two railroads that would be considered small entities for purposes of this analysis, and together they comprise about 7 percent of the railroads impacted directly by this proposed regulation. Thus, a substantial number of small entities in this sector may be impacted. In order to get a better understanding of the total costs for the railroad industry (which forms the basis for the estimates in this IRFA), or more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

- A description of the reasons why action by the agency is being considered.
- A succinct statement of the objectives of, and the legal basis for, the proposed rule.
- A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
- A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
- Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

FRA has proposed part 270 in order to comply with sections 103 and 109 of RSIA. RSIA mandates that FRA, by delegation from the Secretary, shall require each railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). This proposed rule sets forth the requirements for a safety risk reduction program for a railroad that provides intercity rail passenger or commuter rail passenger transportation.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

The purpose of this proposed rule is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroad operators. The proposed rule will require a railroad to establish a program that systematically evaluates railroad safety hazards on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

The proposed rule prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. The proposed rule does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

FRA proposes to add part 270 to title 49 of the Code of Federal Regulations. Part 270 will satisfy the RSIA requirement of a railroad safety risk reduction program for a railroad providing intercity rail passenger or commuter rail passenger service. 49 U.S.C. 20156(a)(1). It will also include protection from admission or discovery of certain information generated solely for the purpose of developing, implementing, or evaluating a system safety program under part 270, or a railroad safety risk reduction program required by FRA for Class I railroads, railroads with inadequate safety performance, or any other railroad. 49 U.S.C. 20119.

3. *A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply*

The ''universe'' of the entities considered in an IRFA generally includes only those small entities that can reasonably expect to be directly regulated by this proposed action. Small passenger railroads are the only types of small entities that may be affected directly by this proposed rule.

''Small entity'' is defined in 5 U.S.C. 601(3) as having the same meaning as ''small business concern'' under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of ''small entities'' not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation.

The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is ''for profit'' may be and still be classified as a ''small entity'' is 1,500 employees for ''Line Haul Operating Railroads'' and 500 employees for ''Switching and Terminal Establishments.'' Additionally, 5 U.S.C. 601(5) defines as ''small entities'' governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. The $20 million limit is based

on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

Passenger Railroads

Commuter and intercity passenger railroads would have to comply with all provisions of Part 270; however, the amount of effort to comply with the proposed rule is commensurate with the size of the entity.

There are two intercity passenger railroads, Amtrak and the Alaska Railroad. Neither can be considered a small entity. Amtrak is a Class I railroad and the Alaska Railroad is a Class II railroad. The Alaska Railroad is owned by the State of Alaska, which has a population well in excess of 50,000.

There are 28 commuter or other short-haul passenger railroad operations in the U.S. Most of these railroads are part of larger transit organizations that receive Federal funds and serve major metropolitan areas with populations greater than 50,000. However, two of these railroads do not fall in this category and are considered small entities: Saratoga & North Creek Railway (SNC), and the Hawkeye Express, which is operated by the Iowa Northern Railway Company (IANR). All other passenger railroad operations in the United States are part of larger governmental entities whose service jurisdictions exceed 50,000 in population.

In 2011 Hawkeye Express transported approximately 5,000 passengers per game over a 7-mile round-trip distance to and from University of Iowa (University) football games. Iowa Northern has approximately 100 employees and is primarily a freight operation totaling 184,385 freight train miles in 2010. The service is on a contractual arrangement with the University, a State of Iowa institution. (The population of Iowa City, Iowa, is approximately 69,000.) Iowa Northern owns and operates the 6 bi-level passenger cars used for this small passenger operation which runs on average 7 days over a calendar year. FRA expects that any costs imposed on the railroad by this regulation will likely be passed on to the University as part of the transportation cost, and requests comment on this assumption.

SNC began operation in the summer of 2011 and currently provides daily rail service over a 57-mile line between Saratoga Springs and North Creek, New York. The SNC, a Class III railroad, is a limited liability company, wholly owned by San Luis & Rio Grande Railroad (SLRG). SLRG is a Class III rail carrier and a subsidiary of Permian Basin Railways, Inc. (Permian), which in turn is owned by Iowa Pacific Holdings, LLC (IPH). The SNC primarily transports visitors to Saratoga Springs, tourists seeking to sightsee along the Hudson River, and travelers connecting to and from Amtrak service. The railroad operates year round, with standard coach passenger trains. Additional service activity includes seasonal ski trains, and specials such as ''Thomas The Train.'' This railroad operates under a five-year contract with the local government, and is restarting freight operations as well. The railroad has about 25 employees. SNC has already developed and is starting to utilize an SSP plan which follows the APTA model of SSP plan features and processes.

FRA has assisted and plans to continue to assist ''new start'' passenger railroads, including small business entities, in the development of their SSPs, starting at the design and planning phase through implementation. FRA will also provide guidance to those railroads so that the scope and content of their SSPs is proportionate to their size and nature of their operation.

The cost burden to the two small entities will be considerably less on average than that of the other 28 railroads. FRA estimates impacts on these two railroads could range on average between $1,375 and $3,150 per annum to comply with the regulation, depending on the existing level of compliance and discount rate (or $14,568 to $62,382 over 20 years per entity, again depending on the existing level of compliance and discount rate.)

Since one of these railroads provides service under contract to a State institution, it may be able to pass some or all of the compliance cost on to that institution. The small entity itself may not be significantly impacted. As indicated above, FRA will assist an entity like the Hawkeye Express in preparing its program and plan if it is not already preparing an SSP. FRA envisions the SSP plan of such an entity as a very concise and brief document. FRA seeks comment on these findings and conclusions.

Contractors

Some passenger railroads use contractors to perform many different functions on their railroads. For some of these railroads, contractors perform safety-related functions, such as operating trains. For the purpose of assessing the impact of an SSP, contractors fall into two groups; larger contractors who perform primary operating and maintenance functions for the passenger railroads and smaller contractors who perform ancillary functions to the primary operations. Larger contractors are typically large private companies such as Herzog, or part of an international conglomerate such as Keolis or Veolia, with substantial multidisciplinary workforces, and are able to perform most all operating functions the passenger railroad requires. Smaller contractors may perform duties such as snow clearing on station platforms, brush clearing, painting stations, etc.

Safety related policy, work rules, guidelines, and regulations are imparted to the small contractors today as part of their contractual obligations and qualification to work on the passenger railroad property. FRA sees minimal additional burden to imparting the same type of information under each passenger railroad's SSP. A very small administrative burden may result.

No provisions of the proposed rule would directly require any contractors (small or large) to do anything unless they are also intercity passenger or commuter railroads.

FRA seeks comment on these findings and conclusions.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

There are reporting, recordkeeping, and compliance costs associated with the proposed regulation. This NPRM proposes what almost all passenger railroads have for the most part been doing voluntarily for some time. FRA believes that the added burden due to these proposed requirements is marginal. The total 20-year cost of this proposed rulemaking is $4.1 million (undiscounted), of which FRA estimates 2.9 percent or less will be attributable to small entities. FRA estimates that the approximate total burden for small railroads for the 20-year period could range between $33,384 and $120,217, depending on discount rates and extent of costs relative to larger railroads. FRA believes this would not be a substantial burden. For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking. FRA expects that most of the skills necessary to comply with

the proposed regulation would be possessed by professional hazard assessment personnel, and record-keeping and reporting personnel.

The following section outlines potential additional burden on small railroads for each subpart of the proposed rule:

Subpart A—General

The policy, purpose, and definitions outlined in subpart A do not impose any direct burdens on small railroads.

Subpart B—System Safety Program Requirements

This subpart of the proposed rule will have a more or less proportional effect on small and large entities. This portion of the proposed rule will create approximately 36 percent of the total burden for small entities. The proposed requirements in this subpart describe what must be developed and placed in the SSP plan to properly implement the SSP. More specifically it requires the development of the risk-based hazard analysis and risk-based hazard management program, technology plans, and fatigue management plans.

Subpart C—Review, Approval, and Retention of System Safety Program Plans

This subpart of the proposed rule will create approximately 14 percent of the total burden for small entities. This activity is for the initial delivery and review of the SSP plan, as well as delivery of any ongoing amendments.

Subpart D—System Safety Program Internal Assessments and External Auditing

This subpart of the proposed rule will create approximately 50 percent of the total burden for small entities. This is for the ongoing cost for the small railroads to perform an internal assessment and report on internal audits on an annual basis as well as host an external audit by FRA or its designees every three years.

RSIA mandates that FRA, as delegated by Secretary, require each railroad carrier that provides intercity rail passenger or commuter rail passenger transportation develop a railroad safety risk reduction program. FRA has no discretion with respect to applicability. All but one passenger railroad currently voluntarily has such programs in place. Thus, for most of these railroads the additional burden would likely only stem from describing such procedures, processes, and programs required by the proposed regulation. FRA estimates one of these railroads would have to develop a program to comply with the proposed regulation. However, the burden for this one railroad would be mitigated because FRA specialists would provide assistance in the development of the program.

Market and Competition Considerations.

The small railroad segment of the passenger railroad industry essentially faces no intra-modal competition. The two railroads under consideration would only be competing with individual automobile traffic and serve in large part as a service offering to get drivers out of their automobiles and off congested roadways. One of the two entities provides a service at a sporting event to assist attendees to travel to the stadium from distant parking lots. The other small entity provides passenger train service to tourist and other destinations. FRA is not aware of any bus service that currently exists that competes with either of these railroads. FRA requests comments and input on current or planned future existence of any such service or competition.

The railroad industry has several significant barriers to entry, such as the need to own the right-of-way and the high capital expenditure needed to purchase a fleet, track, and equipment. As such, small railroads usually have monopolies over the small and segmented markets in which they operate. Thus, while this rule may have an economic impact on all passenger railroads, it should not have an impact on the intra-modal competitive position of small railroads.

5. *Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

FRA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; the proposed regulation in fact supports most other safety regulations for railroad operations.

The FTA first implemented requirements similar to an SSP in 49 CFR part 659 in 1995. However, FTA's part 659 program applies only to rapid transit systems or portions thereof not subject to FRA's rules. 49 CFR 659.3 and 659.5. Therefore, the requirements of FTA's part 659 would not overlap with any of the requirements proposed in this SSP regulation. However, APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads is based on FTA's part 659, so many of the elements in APTA's system safety program are based on FTA's part 659 program. FRA has always had a close working relationship with FTA and the implementation of the part 659 program and proposes to use many of the same concepts from the 659 program in this SSP rulemaking. FRA has noted where the elements in the proposed SSP rule are directly from or are based on elements from FTA's part 659.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a final determination regarding the economic impact on small entities.

C. Federalism

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this proposed rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This NPRM proposes to add part 270, System Safety Program. FRA is not aware of any State having regulations similar to proposed part 270. However, FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and codified at 49 U.S.C. 20106 (Sec. 20106). Sec. 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to Sec. 20106. In addition, as previously discussed, 49 U.S.C. 20119(b) authorizes FRA to issue a rule governing the discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106 and 20119. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
270.7: Waiver Petitions	30 railroads	2 petitions	8 hours	16
270.102(a): Consultation Requirements—RR Consultation with Its Directly Affected Employees on System Safety Program Plan (SSPP)	28 railroads	4 consults	4 hours	16
(b) RR Consultation Statements	30 railroads	30 statements	20 minutes	10
Copies of Consultations Statements by RR to Service List Individuals.	30 railroads	30 copies	1 minute	1
270.103: System Safety Program Plan (SSPP)—Comprehensive Written SSPP Meeting All of This Section's Requirements	30 railroads	30 SSPPs	40 hours	1,200
System Safety Training by RR of Employees/Contractors/Others.	30 railroads	450 trained individuals	2 hours	900
Records of System Safety Trained Employees/Contractors/Others.	30 railroads	450 records	2 minutes	15
Furnishing of RR Results of Risk-Based Hazard Analyses Upon FRA/Participating Part 212 States.	30 railroads	10 results of analyses	20 hours	200
Furnishing of Descriptions of Railroad's Specific Risk Mitigation Methods That Address Hazards Upon FRA Request.	30 railroads	10 description of mitigation methods.	10 hours	100
Furnishing of Results of Railroad's Technology Analysis Upon FRA/Participating Part 212 States' Request.	30 railroads	30 results of technology analyses.	40 hours	1,200
270.201: SSPPs Found Deficient by FRA and Requiring Amendment	30 railroads	4 amended SSPPs	40 hours	160
Review of Amended SSPPs Found Deficient and Requiring Amendment.	30 railroads	1 amended SSPP	40 hours	40
Reopened Review of Initial SSPP Approval for Cause Stated.	30 railroads	2 amended SSPPs	40 hours	80
270.203: Retention of SSPPs	30 railroads	30 copies	10 minutes	5
Retained Copies of SSPPs.				
270.303: Annual Internal SSPP Assessments Conducted by RRs	30 railroads	30 assessments	40 hours	1,200
Certification of Results of RR Internal Assessment by Chief Safety Official.	30 railroads	30 certifications	8 hours	240
270.305: External Safety Audit	30 railroads	6 plans	40 hours	240
RR Submission of Improvement Plans in Response to Results of FRA Audit.				
Improvement Plans Found Deficient by FRA and Requiring Amendment.	30 railroads	2 amended plans	24 hours	48
RR Status Report to FRA of Implementation of Improvements Set Forth in the Improvement Plan.	30 railroads	2 reports	4 hours	8
Appendix B—Additional Documents Provided to FRA Upon Request	30 railroads	2 documents	30 minutes	1

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Consultation with Non-Represented Employees by RRs.	2 railroads	2 consults	8 hours	16

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning the following issues: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Kimberly Toone, Records Management Officer, at 202–493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan or Ms. Toone at the following address: *Robert.Brogan@dot.gov*; *Kimberly.Toone@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

G. Environmental Assessment

FRA has evaluated this proposed rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows: ''(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * * (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.''

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

H. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. For the year 2010, this monetary amount of $100,000,000 has been adjusted to $143,100,000 to account for inflation. This proposed rule would not result in the expenditure of more than $143,100,000 by the public sector in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355, May 22, 2001. Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

J. Privacy Act Statement

Interested parties should be aware that anyone is able to search the electronic form of all comments

received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://www.dot.gov/privacy.html.*

List of Subjects in 49 CFR Part 270

Penalties; Railroad safety; Reporting and recordkeeping requirements; and System safety.

The Proposal

In consideration of the foregoing, FRA proposes to add part 270 to Chapter II, Subtitle B of Title 49, Code of Federal Regulations, to read as follows:

PART 270—SYSTEM SAFETY PROGRAM

Subpart A–General

Subpart B—System Safety Program Requirements

Subpart C—Review, Approval, and Retention of System Safety Program Plans

Subpart D—System Safety Program Internal Assessments and External Auditing

Authority: 49 U.S.C. 20103, 20106–20107, 20118–20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

§ 270.1 Purpose and scope.

(a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. This part requires certain railroads to establish a system safety program that systematically evaluates railroad safety hazards on their systems and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

(b) This part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. This part does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(c) This part prescribes the protection of information generated solely for the purpose of developing, implementing, or evaluating a system safety program under this part or a railroad safety risk reduction program required by this chapter for Class I railroads and railroads with inadequate safety performance.

§ 270.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all—

(1) Railroads that operate intercity or commuter passenger train service on the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service.

(b) This part does not apply to:

(1) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation;

(2) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation;

(3) Operation of private cars, including business/office cars and circus trains; or

(4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 270.5).

§ 270.5 Definitions.

As used in this part—

Administrator means the Federal Railroad Administrator or his or her delegate.

Configuration management means a process that ensures that the configurations of all property, equipment, and system design elements are accurately documented.

FRA means the Federal Railroad Administration.

Fully implemented means that all elements of a system safety program as described in the SSP plan are established and applied to the safety management of the railroad.

Hazard means any real or potential condition (as identified in the railroad's risk-based hazard analysis) that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

Passenger means a person, excluding an on-duty employee, who is on board, boarding, or alighting from a rail vehicle for the purpose of travel.

Person means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, is not considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Positive train control system means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of part 236 of this chapter.

Rail vehicle means railroad rolling stock, including, but not limited to passenger and maintenance vehicles.

Railroad means—

(1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation; and

(2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

Risk means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

SSP plan means system safety program plan.

System safety means the application of management and engineering principles, and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of a system life cycle.

Tourist, scenic, historic, or excursion operations means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations.

§ 270.7 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

§ 270.9 Penalties and responsibility for compliance.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violation has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $105,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)). Appendix A contains a schedule of civil penalty amounts used in connection with this part.

(b) Although the requirements of this part are stated in terms of the duty of a railroad, when any person, including a contractor or subcontractor to a railroad, performs any function covered by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

Subpart B—System Safety Program Requirements

§ 270.101 System safety program; general.

(a) Each railroad subject to this part shall establish and fully implement a system safety program that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. A system safety program shall include a risk-based hazard management program and risk-based hazard analysis designed to proactively identify hazards and mitigate the resulting risks. The system safety program shall be fully implemented and supported by a written SSP plan described in § 270.103.

(b) A railroad's SSP shall be designed so that it promotes and supports a positive safety culture at the railroad.

§ 270.102 Consultation requirements.

(a) *General duty.* (1) Each railroad required to establish a system safety program under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees on the contents of the SSP plan.

(2) For purposes of this part, the term directly affected employees includes any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad. A railroad that consults with such a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

(3) A railroad shall meet no later than (180 days after the effective date of the final rule) with its directly affected employees to discuss the consultation process. The railroad shall notify the directly affected employees of this meeting no less than 60 days before it is scheduled.

(4) Appendix B to this part contains guidance on how a railroad might comply with the requirements of this section.

(b) *Railroad consultation statements.* A railroad required to submit an SSP plan under § 270.201 must also submit, together with that plan, a consultation statement that includes the following information:

(1) A detailed description of the process the railroad utilized to consult with its directly affected employees;

(2) If the railroad was not able to reach agreement with its directly affected employees on the contents of its SSP plan, identification of any known areas of non-agreement and an explanation why it believes agreement was not reached;

(3) If the SSP plan would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization, identification of any such provision and an explanation how the SSP plan would affect it; and

(4) A service list containing the names and contact information for the international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees; any labor organization representative who participated in the consultation process; and any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a railroad submits its SSP plan and consultation statement to FRA, it must also send a copy of these documents to all individuals identified in the service list.

(c) *Statements from directly affected employees.* (1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, then directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining their views on the plan on which agreement was not reached. The FRA Associate Administrator for

Railroad Safety/Chief Safety Officer shall consider any such views during the plan review and approval process.

(2) A railroad's directly affected employees have 60 days following the railroad's submission of a proposed SSP plan to submit the statement described in paragraph (c)(1) of this section.

(d) *Consultation requirements for system safety program plan amendments.* As required by § 270.201(c)(1)(i), a railroad's SSP plan must include a description of the process the railroad will use to consult with its directly affected employees on any subsequent substantive amendments to the railroad's system safety program. The requirements of this paragraph do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

§ 270.103 System safety program plan.

(a) *General.* (1) Each railroad subject to this part shall adopt and fully implement a system safety program through a written SSP plan that, at a minimum, contains the elements in this section. This SSP plan shall be approved by FRA under the process specified in § 270.201.

(2) Each railroad subject to this part shall communicate with each railroad that hosts passenger train service for that railroad and coordinate the portions of the SSP plan applicable to the railroad hosting the passenger train service.

(b) *System safety program policy statement.* Each railroad shall set forth in its SSP plan a policy statement that endorses the railroad's system safety program. This policy statement shall:

(1) Define the railroad's authority for establishment and implementation of the system safety program; and

(2) Be signed by the chief official at the railroad.

(c) *Purpose and scope of system safety program.* Each railroad shall set forth in its SSP plan a statement defining the purpose and scope of the system safety program. The purpose and scope statement shall describe:

(1) The safety philosophy and safety culture of the railroad;

(2) The railroad's management responsibilities within the system safety program; and

(3) How host railroads, contractor operators, shared track/corridor operators, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services as identified by the railroad pursuant to paragraph (e)(2) of this section will, as appropriate, support and participate in the railroad's system safety program.

(d) *System safety program goals.* Each railroad shall set forth in its SSP plan a statement defining the goals for the railroad's system safety program. This statement shall describe clear strategies on how the goals will be achieved and what management's responsibilities are to achieve them. At a minimum, the goals shall be:

(1) Long-term;

(2) Meaningful;

(3) Measurable; and

(4) Focused on the identification of hazards and the mitigation or elimination of the resulting risks.

(e) *Railroad system description.* (1) Each railroad shall set forth in its SSP plan a statement describing the railroad's system. The description shall include: a history of the railroad's operations, including any host operations; the physical characteristics of the railroad; the scope of service; the railroad's maintenance; and identification of the physical plant and any other pertinent aspects of the railroad's system.

(2) Each railroad shall identify the persons that provide significant safety-related services to the railroad.

(f) *Railroad management and organizational structure.* Each railroad shall set forth a statement in its SSP plan that describes the management/organizational structure of the railroad. This statement shall include:

(1) A chart or other visual representation of the organizational structure of the railroad;

(2) A description of how safety responsibilities are distributed within the railroad organization;

(3) Clear identification of the lines of authority used by the railroad to manage safety issues; and

(4) A description of the relationships and responsibilities between the railroad, host railroads, contract operators, shared track/corridor operators, and other entities or persons that provide significant safety-related services. The statement shall set forth the roles and responsibilities in the railroad's system safety program for each host railroad, contract operator, shared track/corridor operator, or other entity or person that provides significant safety-related services.

(g) *System safety program implementation plan.* Each railroad shall set forth a plan in its SSP plan that describes how the system safety program will be implemented on that railroad. This plan shall include a description of the:

(1) Roles and responsibilities of each position or job function that has significant responsibility for implementing the system safety program, including those held by employees, contractors who provide significant safety-related services, and other entities or persons that provide significant safety-related services; and

(2) Milestones necessary to be reached to fully implement the program.

(h) *Maintenance, inspection and repair program.* (1) Each railroad shall identify and describe in its SSP plan the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting railroad safety. Examples of infrastructure and equipment that directly affect railroad safety include: fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, and traction power distribution systems.

(2) Each description of the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting safety shall include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment.

(i) *Rules compliance and procedures review.* Each railroad shall set forth a statement describing the processes and procedures used by the railroad to develop, maintain, and comply with the railroad's rules and procedures directly affecting railroad safety and to comply with the applicable railroad safety laws and regulations found in this chapter. The statement shall include:

(1) Identification of the railroad's operating and safety rules and procedures that are subject to review under this chapter;

(2) Techniques used to assess the compliance of the railroad's employees with the railroad's operating and safety rules and maintenance procedures, and applicable FRA regulations; and

(3) Techniques used to assess the effectiveness of the railroad's supervision relating to the compliance with the railroad's operating and safety rules and maintenance procedures, and applicable railroad safety laws and regulations.

(j) *System safety program employee/contractor training.* (1) Each railroad shall set forth a statement in its SSP plan that describes the railroad's system safety program training plan. A system safety program training plan shall set forth the procedures in which employees who are responsible for implementing and supporting the SSP, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services will be trained on the railroad's system safety

program. A system safety program training plan shall help ensure that all personnel who are responsible for implementing and supporting the system safety program understand the goals of the program, are familiar with the elements of the railroad's program, and have the requisite knowledge and skills to fulfill their responsibilities under the program. The railroad shall keep a record of training conducted under this part and update that record as necessary.

(2) For each position or job function identified pursuant to paragraph (g)(1) of this section, the training plan shall describe the frequency and content of the system safety program training the position receives.

(3) If a position or job function is not identified under paragraph (g)(1) of this section as having significant responsibilities to implement and support the system safety program but the position or job function is safety related or has a significant impact on safety, personnel in those positions or performing those job functions shall receive training in basic system safety concepts and the system safety implications of their position or job function.

(4) Training under this subpart may be conducted by interactive computer-based training, video conferencing, or formal classroom training.

(5) The system safety program training plan shall set forth the process used to maintain and update the necessary training records required by this part.

(6) The system safety program training plan shall set forth the process used by the railroad to ensure that it is complying with the training requirements set forth in the training plan.

(k) *Emergency management.* Each railroad shall set forth a statement in its SSP plan that describes the processes used by the railroad to manage emergencies that may arise within its system including, but not limited to, the processes to comply with applicable emergency equipment standards contained in part 238 of this chapter and the passenger train emergency preparedness requirements contained in part 239 of this chapter.

(l) *Workplace safety.* Each railroad shall set forth a statement in its SSP plan that describes the programs established by the railroad that protect the safety of the railroad's employees and contractors. The statement shall describe any:

(1) Processes that help ensure the safety of employees and contractors while working on or in close proximity to the railroad's property as described in paragraph (e) of this section;

(2) Processes that help ensure the employees and contractors understand the requirements established by the railroad pursuant to paragraph (g)(1) of this section; and

(3) Fitness-for-duty programs, including standards for the control of alcohol and drug use contained in part 219 of this chapter, fatigue management programs established by this part, and medical monitoring programs.

(m) *Public safety outreach program.* Each railroad shall establish and set forth a statement in its SSP plan that describes its public safety outreach program that provides safety information to railroad passengers and the general public.

(n) *Accident reporting and investigation.* Each railroad shall set forth a statement in its SSP plan that describes the processes that the railroad uses to receive notification of accidents, investigate and report those accidents, and develop, implement, and track any corrective actions found necessary to address the investigation's finding(s).

(o) *Safety data acquisition.* Each railroad shall set forth a statement in its SSP plan that describes the processes used to collect, maintain, analyze, and distribute safety data in support of the system safety program.

(p) *Contract procurement requirements.* Each railroad shall set forth a statement in its SSP plan that describes the process to help ensure that safety concerns and hazards are adequately addressed during the safety-related contract procurement process.

(q) *Risk-based hazard management program.* Each railroad shall establish a risk-based hazard management program as part of the railroad's system safety program. The risk-based hazard management program shall be fully described in the SSP plan. The description of the risk-based hazard management program shall include:

(1) The identity of the individual(s) responsible for administering the risk-based hazard management program;

(2) The identities of stakeholders who will participate in the risk-based hazard management program;

(3) The structure and participants in any hazard management teams or safety committees that a railroad may establish to support the risk-based hazard management program;

(4) The process for setting goals for the risk-based hazard management program and how performance against the goals will be reported;

(5) The processes used in the risk-based hazard analysis to identify hazards on the railroad's system;

(6) The processes or procedures that will be used in the risk-based hazard analysis to analyze hazards and support the risk-based hazard management program;

(7) The methods used in the risk-based hazard analysis to determine the severity and frequency of hazards and to calculate the resulting risk;

(8) The methods used in the risk-based hazard analysis to identify actions that mitigate or eliminate hazards and corresponding risks.

(9) How decisions affecting safety of the rail system will be made relative to the risk-based hazard management program;

(10) The methods used in the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system.

(11) The method used to maintain records of identified hazards and risks and mitigations throughout the life of the rail system.

(r) *Risk-based hazard analysis.* (1) Once FRA approves a railroad's SSP pursuant to § 270.201(b), the railroad shall apply the risk-based hazard analysis methodology identified in paragraph (q)(5) through (7) of this section to identify and analyze hazards on the railroad system and to determine the resulting risks. At a minimum, the aspects of the railroad system that should be analyzed include: operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, employee fatigue as identified in paragraph (s) of this section, new technology as identified in paragraph (t) of this section, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations.

(2) A risk-based hazard analysis shall identify and implement specific actions using the methods described in paragraph (q)(8) of this section that will mitigate or eliminate the hazards and resulting risks identified by paragraph (r)(1) of this section.

(3) A railroad shall also conduct a risk-based hazard analysis pursuant to paragraphs (r)(1) and (2) of this section when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

(s) *Technology analysis and implementation plan.* (1) A railroad shall conduct a technology analysis that evaluates current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified in the risk-based hazard analysis process. The railroad shall

analyze the safety impact, feasibility, and cost and benefits of implementing technologies that will mitigate or eliminate hazards and the resulting risks. At a minimum, the technologies a railroad shall consider as part of its technology analysis are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology. The railroad shall make the results of the technology analysis conducted pursuant to this paragraph available upon request to representatives of FRA upon request and States participating under part 212 of this chapter.

(2) A railroad shall establish a technology implementation plan as part of its SSP plan that contains the results of the technology analysis conducted pursuant to paragraph (s)(1) of this section. If a railroad decides to implement any of the technologies identified in the technology analysis based on the technology's safety impact, feasibility, or costs and benefits, the technology implementation plan shall describe the railroad's plan and a prioritized implementation schedule for the development, adoption, implementation and maintenance of those technologies over a 10-year period.

(3) Except as required by subpart I of part 236 of this chapter, if a railroad decides to implement positive train control systems as part of its technology implementation plan, the railroad shall set forth and comply with a schedule for implementation of the positive train control system no later than December 31, 2018.

(t) *Fatigue management plan.* A railroad shall set forth in its SSP plan a Fatigue Management Plan no later than (three years after the effective date of the final rule).

(u) *Safety Assurance*—(1) *Change management.* Each railroad shall establish and set forth a statement in its SSP plan describing processes and procedures used by the railroad to manage significant operational changes, system extensions, system modifications, or other significant changes that will have a direct impact on railroad safety.

(2) *Configuration management.* Each railroad shall establish a configuration management program and describe the program in its SSP plan. The configuration management program shall—

(i) State who within the railroad has authority to make configuration changes;

(ii) Establish processes to make configuration changes to the railroad's system; and

(iii) Establish processes to ensure that all departments of the railroad affected by the configuration changes are formally notified and approve of the change.

(3) *Safety certification.* Each railroad shall establish and set forth a statement in its SSP plan that describes the certification process used by the railroad to help ensure that safety concerns and hazards are adequately addressed prior to the initiation of operations and major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment.

(v) *Safety culture.* A railroad shall set forth a statement in its SSP plan that describes how it measures the success of its safety culture identified in paragraph (c)(1) of this section.

§ 270.105 Discovery and admission as evidence of certain information.

(a) Any information (including plans, reports, documents, surveys, schedules, lists, or data) compiled or collected solely for the purpose of developing, implementing, or evaluating a system safety program under this part, including a railroad carrier's analysis of its safety risks conducted pursuant to § 270.103(r)(1) and its statement of the mitigation measures with which it would address those risks created pursuant to § 270.103(r)(2), shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage.

(b) This section does not affect the discovery, admissibility, or consideration for other purposes of information (including plans, reports, documents, surveys, schedules, lists, or data) compiled or collected for a purpose other than that specifically identified in paragraph (a) of this section. Such information shall continue to be discoverable and admissible into evidence if it was discoverable and admissible prior to the existence of this section. This includes such information that either:

(1) Existed prior to (365 days from the publication of the final rule);

(2) Existed prior to (365 days from the publication of the final rule) and that continues to be compiled or collected; or

(3) Is compiled or collected after (365 days from the publication of the final rule).

(c) State discovery rules and sunshine laws that could be used to require the disclosure of information protected by paragraph (a) of this section are preempted.

(d) Paragraphs (a) through (c) of this section shall apply to any railroad safety risk reduction programs required by this chapter for Class I railroads, railroads with inadequate safety performance, or any other railroad.

Subpart C—Review, Approval, and Retention of System Safety Program Plans

§ 270.201 Filing and approval.

(a) *Filing.* (1) Each railroad to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590, not more than (395 days after the effective date of the final rule) or not less than 90 days prior to commencing operations, whichever is later.

(2) The railroad shall not include in its SSP plan the risk-based hazard analysis conducted pursuant to § 270.103(r). The railroad shall make the results of any risk-based hazard analysis available upon request to representatives of FRA and States participating under part 212 of this chapter.

(3) The SSP plan shall include the signature, name, title, address, and telephone number of the chief safety officer who bears primary managerial authority for implementing the program for the submitting railroad. The system safety plan shall also include the name and contact information for:

(i) The primary person responsible for managing the system safety program, and

(ii) The senior representatives of host railroads, contract operators, shared track/corridor operators, and others who provide significant safety-related services.

(4) As required by § 270.102(b), each railroad must submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its system safety program. Directly affected employees may also file a statement in accordance with § 270.102(c).

(5) The chief official responsible for safety and who bears primary managerial authority for implementing the program for the submitting railroad shall certify that the contents of the SSP plan are accurate and that the railroad

will implement the contents of the program as approved by FRA pursuant to paragraph (b) of this section.

(b) *Approval.* (1) Within 90 days of receipt of a SSP plan, or within 90 days of receipt of each SSP plan submitted prior to the commencement of railroad operations, FRA will review the proposed SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. This review will also consider any statement submitted by directly affected employees pursuant to § 270.102.

(2) FRA will notify the primary contact person of each affected railroad in writing whether the proposed plan has been approved by FRA, and if not approved, the specific points in which the plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 270.102(b).

(3) If a proposed system safety plan is not approved by FRA, the affected railroad shall amend the proposed plan to correct all deficiencies identified by FRA and provide FRA with a corrected copy of the SSP plan not later than 60 days following receipt of FRA's written notice that the proposed SSP plan was not approved.

(c) *Review of Amendments.* (1)(i) Railroads shall submit amendment(s) to the SSP plan to FRA not less than 60 days prior to the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s). The cover letter shall also describe the process it used pursuant to § 270.102(d) to consult with directly affected employees on the amendment(s).

(ii) If the amendment(s) is safety-critical and the railroad is unable to submit the amended SSP plan to FRA 60 days prior to the proposed effective date of the amendment(s), the railroad shall submit the amended SSP plan to FRA as soon as possible thereafter.

(2)(i) FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person of each affected railroad whether the proposed amended plan has been approved by FRA, and if not approved, the specific points in which the proposed amendment(s) to the SSP plan is deficient.

(ii) If FRA has not notified the railroad by the proposed effective date of the amendment(s) whether the proposed amended plan has been approved or not, the railroad may implement the amendment(s), subject to FRA's decision.

(iii) If a proposed SSP amendment is not approved by FRA, the affected railroad shall correct all deficiencies identified by FRA. The railroad shall provide FRA with a corrected copy of the amended SSP plan no later than 60 days following receipt of FRA's written notice that the proposed amendment was not approved.

(d) *Reopened Review.* Following initial approval of a plan, or amendment, FRA may reopen consideration of the plan, or amendment, for cause stated.

§ 270.203 Retention of system safety program plan.

Each railroad to which this part applies shall retain at its system headquarters and at any division headquarters, one copy of the SSP plan required by this part and one copy of each subsequent amendment to that plan. These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

Subpart D—System Safety Program Internal Assessments and External Auditing

§ 270.301 General.

The system safety program and its implementation shall be assessed internally by the railroad and audited externally by the FRA or FRA's designee.

§ 270.303 Internal system safety program assessment.

(a) Following FRA's initial approval of the railroad's SSP plan pursuant to § 270.201, the railroad shall annually conduct an assessment of the extent to which:

(1) The system safety program is fully implemented;

(2) The railroad is in compliance with the implemented elements of the approved system safety program; and

(3) The railroad has achieved the goals set forth in § 270.103(d).

(b) As part of its system safety plan, the railroad shall set forth a statement describing the processes used to:

(1) Conduct internal system safety program assessments;

(2) Internally report the findings of the internal system safety program assessments;

(3) Develop, track, and review recommendations as a result of the internal system safety program assessment;

(4) Develop improvement plans based on the internal system safety program assessments. Improvement plans shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings;

(5) Manage revisions and updates to the SSP plan based on the internal system safety program assessments; and

(6) Comply with the reporting requirements set forth in § 270.201.

(c)(1) Within 60 days of completing its internal SSP plan assessment pursuant to paragraph (a) of this section, the railroad shall:

(i) Submit to FRA a copy of the railroad's internal assessment report that includes a system safety program assessment and the status of internal assessment findings and improvement plans; and

(ii) Outline the specific improvement plans for achieving full implementation of the SSP plan, as well as achieving the goals of the plan.

(2) The railroad's chief official responsible for safety shall certify the results of the railroad's internal SSP plan assessment.

§ 270.305 External safety audit

(a) FRA may conduct, or cause to be conducted, external audits of a railroad's system safety program. Each audit will evaluate the railroad's compliance with the elements required by this part in the railroad's approved SSP plan. FRA shall provide the railroad written notification of the results of any audit.

(b)(1) Within 60 days of FRA's written notification of the results of the audit, the railroad shall submit to FRA for approval, if necessary, improvement plans to address all audit findings. Improvement plans submitted shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address audit findings and specify target dates and milestones to implement the improvements that address the audit findings.

(2) If FRA does not approve the railroad's improvement plan, FRA will notify the railroad of the specific deficiencies in the improvement plan. The affected railroad shall amend the proposed plan to correct the deficiencies identified by FRA and provide FRA with a corrected copy of the improvement plan no later than 30 days following receipt of FRA's written notice that the proposed plan was not approved.

(3) Upon request, the railroad shall provide to FRA and States participating under part 212 of this chapter for review

a report regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

Appendix A to Part 270—Schedule of Civil Penalties [Reserved]

Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process

A railroad required to develop a system safety program under this part must in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the SSP plan. *See* § 270.102(a). This appendix discusses the meaning of the terms ''good faith'' and ''best efforts,'' and provides guidance on how a railroad could comply with the requirement to consult with directly affected employees on the contents of its SSP plan. Specific guidance will be provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization.

The Meaning of ''Good Faith'' and ''Best Efforts''

''Good faith'' and ''best efforts'' are not interchangeable terms representing a vague standard for the § 270.102 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad must independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 270.102.

The good faith obligation requires a railroad to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an SSP plan. If a railroad consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. A railroad may also fail to meet its good faith obligation if it merely attempts to use the SSP plan to unilaterally modify a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization.

On the other hand, ''best efforts'' establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a railroad must pursue to reach agreement with its employees on the contents of its system safety program. While the good faith obligation is concerned with the railroad's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad may, however, wish to hold off substantive consultations regarding the contents of its SSP until one year after the effective date of the rule in order to ensure that information generated as part of the process is protected from discovery and admissibility into evidence under § 270.105 of the rule. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing SSP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 270.102 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 270.102(b) and any statements submitted by employees pursuant to § 270.102(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the SSP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 270.102. Pursuant to § 270.201(b)(3), if FRA does not approve the SSP plan, the railroad will have 60 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 60 days a SSP plan meeting the consultation requirements of § 270.102, the railroad could be subject to penalties for failure to comply with § 270.201(b)(3).

Guidance on How a Railroad May Consult With Directly Affected Employees

Because the standard imposed by the best efforts obligation will vary depending upon the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 270.102. Therefore, FRA believes it is important to maintain a flexible approach to the § 270.102 consultation requirements, in order to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an SSP plan. FRA believes this guidance may be useful as a starting point for railroads that are uncertain about how to comply with the § 270.102 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

This guidance does not establish prescriptive requirements with which a railroad must comply, but merely outlines a consultation process a railroad may choose to follow. A railroad's consultation statement could indicate that the railroad followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of a SSP plan.

Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 270.102(a)(2), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of a SSP plan will be considered to have consulted with the directly affected employees represented by that organization.

A railroad could utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of an SSP plan.

- Pursuant to § 270.102(a)(3), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) within 180 days of the effective date of the final rule to begin the process of consulting on the contents of the railroad's SSP plan. A railroad must provide notice at least 60 days before the scheduled meeting.
- During the time between the initial meeting and the applicability date of § 270.105 the parties may meet to discuss administrative details of the consultation process as necessary.
- Within 60 after the applicability date of § 270.105 a railroad should have a meeting with the directed affected employees to discuss substantive issues with the SSP.
- Within 90 days after the applicability date of § 270.105, a railroad would file its SSP plan with FRA.
- As provided by § 270.102(c), if agreement on the contents of a SSP plan could not be reached, a labor organization (representing a class or craft of the railroad's directly affected employees) could file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining its views on the plan on which agreement was not reached.

Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a railroad's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a railroad with non-represented employees must make a concerted effort to ensure that its non-

represented employees are aware that they are able to participate in the development of the railroad's SSP plan. FRA therefore is providing the following guidance regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its SSP plan.

• Within 60 days of the effective date of the final rule, a railroad should notify non-represented employees that—

(1) The railroad is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its SSP plan;

(2) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and

(3) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed SSP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

• This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

(1) Electronically, such as by email or an announcement on the railroad's Web site;

(2) By posting the notification in a location easily accessible and visible to non-represented employees; or

(3) By providing all non-represented employees a hard copy of the notification. A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

• Following the initial notification (and before the railroad submits its SSP plan to FRA), a railroad should provide non-represented employees a draft proposal of its SSP plan. This draft proposal should solicit additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments to the railroad on the draft.

• Following this 60-day comment period and any changes to the draft SSP plan made as a result, the railroad should submit the proposed SSP plan to FRA, as required by this part.

• As provided by § 270.102(c), if agreement on the contents of an SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

Issued in Washington, DC, on August 17, 2012.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

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To authorize the Architect of the Capitol to establish battery recharging stations for privately owned vehicles in parking areas under the jurisdiction of the House of Representatives at no net cost to the Federal Government. (Aug. 16, 2012; 126 Stat. 1303)

H.R. 3670/P.L. 112–171

To require the Transportation Security Administration to comply with the Uniformed Services Employment and Reemployment Rights Act. (Aug. 16, 2012; 126 Stat. 1306)

H.R. 4240/P.L. 112–172

Ambassador James R. Lilley and Congressman Stephen J. Solarz North Korea Human Rights Reauthorization Act of 2012 (Aug. 16, 2012; 126 Stat. 1307)

S. 3510/P.L. 112–173

To prevent harm to the national security or endangering the military officers and civilian employees to whom internet publication of certain information applies, and for other purposes. (Aug. 16, 2012; 126 Stat. 1310)

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